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In the Supreme Court of the United States

OCTOBER TERM, 1980

MACHINE TOOL AND GEAR, INC., Petitioner,

v

NATIONAL LABOR RELATIONS BOARD, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

THE FISHMAN GROUP
By: Steven J. Fishman
And
Malcolm D. Brown
(Donald H. Scharg with them on the Petition)
Attorneys for Petitioner,
Machine Tool and Gear, Inc.
2550 South Telegraph Road
Suite 107
Bloomfield Hills, MI 48013
(313) 338-8700

RENAISSANCE PRINTING COMPANY, 76 W. ADAMS, KALES BUILDING, DETROIT, MICHIGAN 48226 — Phone (313) 964-3185

QUESTIONS PRESENTED FOR REVIEW

1. Does *Gissel Packing* allow the National Labor Relations Board to merely adopt *pro forma* the conclusory findings of the Administrative Law Judge or must the Board set forth, independently and in detail, the analysis and reasons why a *Gissel* bargaining remedy is appropriate?

2. Whether an individual placed in sole charge of a plant with a shift of ten workers is a supervisor and can be discharged for union activities.

PARTIES TO THE PROCEEDINGS

Machine Tool and Gear, Inc. (hereinafter "MTG") is the Petitioner, and the Respondent is the National Labor Relations Board (hereinafter "NLRB" or "Board"). The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (hereinafter "UAW"), was the charging party in the proceedings before the NLRB.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at ____ F2d ____ and a copy is appended hereto as Appendix A, infra. The decision and order of the NLRB and of the Administrative Law Judge are reported at 237 NLRB No. 172 (1978). Both are appended hereto as Appendices B and C, respectively, infra.

JURISDICTION

The opinion of the Court of Appeals for the Sixth Circuit (Appendix A), enforcing the decision and order of the National Labor Relations Board, was entered on September 30, 1980. The jurisdiction of this Court is invoked under 28 USC §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

> Section 152(3). The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his

home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

United States Code, Title 29:

Section 152(11). The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

United States Code, Title 29:

Section 158(a). It shall be an unfair labor practice for an employer . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

United States Code, Title 29:

Section 159(a). Representatives designated or selected by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . .

United States Code, Title 29:

Section 159(c)(1). Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board -

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

United States Code, Title 29:

Section 160(b). Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with

the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28.

United States Code, Title 29:

Section 160(c). The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person

to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceedings a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

United States Code, Title 29:

Section 160(f). Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States Court of Appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Colum-

bia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the Court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

United States Code, Title 29:

Section 164(a). Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

STATEMENT OF THE CASE

MTG is a small automotive parts manufacturer located in a suburb of Detroit. At the time of the UAW organizing drive, MTG employed 40 production and maintenance employees on two shifts. In the period November 22-24, 1976, 23 of the 40 employees signed union authorization cards. The UAW never petitioned the NLRB for an election and did not make a bargaining demand on MTG until January 14, 1977.

As a result of an unfair labor practice charge filed by the UAW on January 24, 1977, it was determined by the NLRB that MTG had violated §§ 8(a)(1) and (3) of the Act. Because the UAW was determined to have a card majority by November 24, 1976, and MTG engaged in what the Administrative Law Judge described as "extensive" unfair labor practices, he concluded a prospective bargaining order was an appropriate remedy. On appeal, the three-member panel of the NLRB, in summary fashion, characterized MTG's conduct, in its decision of August 25, 1978, as "substantial violations of the Act", and made the bargaining order retroactive to January 14, 1977, the date of the UAW's bargaining demand. No independent and detailed analysis was ever made by the NLRB as to why the drastic remedy of bargaining was more appropriate than the preferred Board conducted election, following a specific cease and desist order directed at the underlying unfair labor practices.

Included among the unfair labor practices were threats of reprisal and interrogation of Gregory Stone as to his union sympathies, and Stone's ultimate discharge. Stone solicited eight of the UAW's 23 signed cards. The Board declined to find that Stone was a statutory supervisor within the meaning of §2(11) of the Act, and unprotected from conduct which otherwise was violative of the Act. Accordingly, the union authorization cards that he solicited were counted.

Stone was in charge of the second shift with at least ten machine operators and was the only person with that responsibility present in the plant on the second shift (23d-24d)[1]. In that capacity, Stone assigned and transferred employees (24d-25d), checked and corrected their work, selected employees for overtime (34d-35d), and granted time off (43d). He had authority to and did effectively recommend the hire and lay off of employees (33d-34d, 5d). He was cloaked with authority to discipline (25d-26d), could and did stop employees from "goofing off" (44d), and adjusted employee problems (25d-26d). Stone was the highest paid person on the second shift (24d), substituted for the day shift supervisor (38d), and was considered by MTG and its production and maintenance employees as the second shift foreman or supervisor (4d, 49d, 61d-62d, 69d-70d). He had a key to the plant and locked up at the end of the afternoon shift (23d). All of this was confirmed by the Board General Counsel's employee witnesses (49d, 61d-62d, 69d-70d)[2].

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[1] Citations are to the portions of the transcript of the hearing before the Administrative Law Judge, reproduced at Appendix D, infra.

[2] For purposes of this petition we have relied only upon the testimony and cross examination of Stone and three bargaining unit members, called as witnesses by General Counsel.

REASONS FOR THE WRIT

1. The Gissel Bargaining Remedy Requires Independent Board Analysis

Under established federal labor policy,

> "... secret elections are generally the most satisfactory — indeed the preferred method of ascertaining whether a union has majority support." *NLRB* v *Gissel Packing Company, Inc.*, 395 US 575, 602 (1969).

This Court recognized in *Gissel* that an employer's unfair labor practices could, under some circumstances interfere with the election processes and result in a bargaining order remedy without a union election victory. The Supreme Court also used *Gissel* as an opportunity to give guidance to the NLRB in its review of future cases involving *Gissel* bargaining remedies. *Gissel* set forth the detailed analysis which the Board must undertake before a bargaining order can lawfully be imposed.

Specifically, where a union at one time obtained executed authorization cards from a majority of the employees in the unit, the Supreme Court approved the use of bargaining orders where the election process is impeded. Under the Court's directive,

> "In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their reoccurrence in the future. *If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of*

> *traditional remedies, though present, is slight, and that employees sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue."* *Gissel*, at 614-615 (emphasis added; citation omitted).

This analysis is necessary and required because,

> "...under the Board's remedial power there is still [another] category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order. There is, the Board says, no per se rule that the commission of any unfair practice will automatically result in a §8(a)(5) violation and the issuance of an order to bargain." *Gissel*, at 615.

Because not all employer unfair labor practices will result in the issuance of a *Gissel* bargaining remedy, the scope of analysis outlined by this Court is of great importance. The *Gissel* Court placed the obligation to undertake the necessary analysis upon the NLRB. When a request is made to abandon the "preferred" secret election process, it is for the Board,

> "...to make that determination, based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity." *Gissel*, at 612, n. 32.

Due to the many factors which must be reviewed and the substantial impact of the Board's eventual decision, deliberate consideration, as envisioned by *Gissel* is a strict requirement. As then Chairman Miller explained,

> *"No recent decisional task has more perplexed this Board, or confounded the courts which review our*

> *decisions, than that committed to us in Gissel:* To determine whether an order to bargain is an appropriate remedy for employer interference with rights protected by Section 7 of the Act. * * *
>
> *The standards by which we must decide whether to enter an order to bargain are uniquely amorphous. The Supreme Court has instructed us to consider: the extensiveness of . . . unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future.* The Court thus made abundantly clear, as my colleagues correctly state that the aim of our inquiry must be somehow to quantify the impact upon employees which follows from unlawful conduct by their employer. In such an inquiry, there can be few per se rules. We must be alert in each case to the inescapable fact that while the categories of conduct prohibited by the Act are finite, there are infinitely various circumstances which will influence employee perceptions of such prohibited conduct. And, under *Gissel*, it is that infinite variety which we must address." *General Stencils, Inc.*, 195 NLRB 1109, 1111 (1972) (Miller dissenting). (Emphasis added; footnotes omitted).

But, in the twelve years since *Gissel* was decided, the NLRB has refused to meet its responsibilities and engage in the analysis required by the Supreme Court. Rather than give effective review to bargaining orders by engaging in an analysis to explain with specificity the results of the unfair labor practices and the alleged resultant likelihood of a fair election, the NLRB has completely abdicated the obligations and responsibilities imposed by *Gissel*. The instant case is a vivid example

of Board abdication. Here, the Administrative Law Judge's decision merely listed the alleged unfair labor practices and summarily concluded that traditional Board remedies could not insure the reliability of the "preferred" secret election. Upon review, the NLRB, which is required to utilize its expertise, rubber stamped the decision which only contained a " . . . litany, reciting conclusions by rote without factual explanation."[3]

Although the Court of Appeals for the Sixth Circuit found the Board's bargaining order proper, the Board's decision still lacks the independent and detailed analysis required by *Gissel*. The imposition of a bargaining order in the instant case is devoid of any analysis, specificity, or appearance of careful consideration. There has been no analysis showing that the alleged unfair labor practices undermined the majority strength of the union or impeded the election processes. Moreover, the Board has engaged in no analysis whatsoever concerning the past effects on election conditions of the unfair labor practices and their likelihood of recurrence in the future. In fact, the NLRB engaged in no independent analysis whatsoever.

This lack of effective analysis is neither new nor novel, but the implementation of a policy decision by the NLRB that it is not required to perform the necessary *Gissel* analysis. However, the Courts of Appeals have undertaken the responsibility of constantly reminding the Board that *Gissel* contains specific analytical standards which must be met and that:

1. The Board may not rubber stamp the conclusions of the Administrative Law Judge;

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[3] *NLRB* v *American Cable System, Inc.*, 427 F2d 446, 449 (5th Cir 1969), cert. den. 400 US 957 (1970).

2. The NLRB is required to draw on its fund of expertise and knowledge in consideration of a bargaining order, a non-traditional remedy;

3. The decision to impose a bargaining order without a "preferred" secret election requires that the NLRB fully explain its reasons and engage in a complete analysis and effective review of the specific factors relied upon;

4. The imposition of *Gissel* bargaining remedies without adequate analysis prevents effective review by the appellate courts.

No less than five (5) Courts of Appeals are in agreement that the Board is shirking its responsibility on this substantial obligation. *NLRB* v *General Stencils, Inc.*, 438 F2d 894 (2nd Cir, 1971); *NLRB* v *Appletree Chevrolet, Inc.*, 608 F2d 988 (4th Cir, 1979); *NLRB* v *American Cable Systems, Inc.*, 427 F2d 446 (5th Cir, 1969), cert. den. 400 US 957 (1970); *Automated Business Systems* v *NLRB*, 497 F2d 262 (6th Cir, 1974); *Peerless of America, Inc.* v *NLRB*, 484 F2d 1108 (7th Cir, 1973); *First Lakewood Associates* v *NLRB*, 582 F2d 416 (7th Cir, 1978); *Red Oaks Nursing Home, Inc.* v *NLRB*, ____ F2d ____, 105 LRRM 3028 (7th Cir, 1980). These Courts have been forced to constantly remand decisions to the Board for further analysis, or undertake the required analysis themselves (e.g. *First Lakewood*), a procedure the Supreme Court sought to avoid in *Gissel*, at 612 n. 32.

The NLRB has responded by ignoring these directives from the Courts of Appeals. In *Chandler Motors, Inc.*, 236 NLRB 1565, 1566 n. 8 (1978), the Board answered its critics, the Courts of Appeals, stating

> "... We have deemed it necessary in this case to set forth in detail the reasons why we find it ap-

> propriate to grant a *Gissel* bargaining remedy, rather than to adopt and rely on the findings of the Administrative Law Judge. However, we do not thereby accede to the position of the U.S. Court of Appeals for the Third Circuit in such cases as *NLRB* v *Armcor, supra*, and *Kenworth Trucks of Philadelphia, Inc.* v *NLRB*, 98 LRRM 2263, 84 LC ¶10,548 (C.A. 3, 1978). *With all deference to the court, we believe that the administration of the Act, for which we are responsible, requires that we await a final disposition by the Supreme Court on the issue and order to resolve the conflict with other circuits on this important issue. We wish to make it clear that our adherence is intended as nothing more than respectful disagreement with the view of the Third Circuit on the matter and an attempt to protect, until the conflict is resolved by the Supreme Court, what we consider to be a substantial legal issue." Id* at 1566 (emphasis added).

The Board's position in giving the *Gissel* criteria summary treatment is now supported by the Third Circuit. In *Kenworth Trucks of Philadelphia, Inc.* v *NLRB*, 580 F2d 55 (3rd Cir, 1978), the Third Circuit did a turnabout announcing that it will enforce *Gissel* bargaining orders only after a statement of reasons by the Administrative Law Judge.

Clearly, both the NLRB and the Courts of Appeals consider a determination of the requirements of the *Gissel* analysis to be a substantial legal issue of great importance. Having struggled with this issue for twelve years, the Board and courts seek guidance from the Supreme Court. The time is now ripe for the Court to resolve this conflict to ensure the orderly and proper administration of the Act. And, guidance is needed.

This Court has previously acknowledged that a secret election remains the "preferred" method of determining the employees' representative and that a bargaining order should be issued and enforced only when a fair election is not feasible. *Gissel*, at 602. Because the NLRB has never exercised its rule-making powers to establish rules for application to *Gissel* situations or by case law enumerated all of the considerations to be examined, the issuance of a bargaining order is a subjective and sometimes arbitrary determination. See e.g., *NLRB* v *General Stencils, Inc.*, 438 F2d 894 (2nd Cir, 1971).

It is therefore necessary for the NLRB, as required by *Gissel*, to engage in an independent evaluation of the relevant factors previously enunciated by this Court. Without such an independent evaluation by the NLRB, the necessary analytical determination has deteriorated into the mere rubber stamping of Administrative Law Judges' opinions. These opinions, adopted without full analysis by the Board, fail to go beyond the mere incantation of Supreme Court sanctioned terms. As recognized by the Courts of Appeals, the analytical process envisioned by *Gissel* has been reduced to a repetition of "buzz words" by the NLRB, the presumed expert in the field of labor relations, rendering effective appellate review difficult. The Board must be directed to undertake the proper analysis as required by *Gissel*.

Guidance from this Court is also needed in the interests of judicial economy and to alleviate the endless delays which increase litigation without resolving controversy. When the NLRB fails to properly review a *Gissel* bargaining remedy case, the Courts of Appeals are forced to remand the parties to the Board for a full and independent analysis. Because the Board refuses to properly evaluate the imposed *Gissel* bargaining remedy, these cases bounce constantly between the NLRB and the courts. As an example, the Board in

General Stencil first issued a decision in August, 1969. It then was appealed to the Second Circuit Court of Appeals, which remanded the case to the NLRB for proper evaluation under *Gissel*. When the Board failed for the second time to properly evaluate the case under *Gissel*, the Second Circuit, in December, 1972, was compelled to deny enforcement *in toto*.

General Stencil is not an exception, but unfortunately the rule. In *NLRB* v *Jamiaca Towing, Inc.*, ____ F2d ____, 105 LRRM 2959 (2nd Cir, 1980), the Second Circuit again refused to engage in endless remands and concluded,

> "At this late date, almost five years after the events at issue, no useful purpose would be served by a second remand. In our view the Board, despite a full opportunity to remedy basic deficiencies in the record, has failed to do so.
>
> Accordingly, the order is enforced except for the bargaining requirement which is denied." *Id.* at 2965.

Gissel bargaining remedies are of great importance to employers, employees and unions, too important to be bounced between the Board and the courts.

Because of the significant conflict between the Courts of Appeals and the NLRB on the important issue of the degree to which the Board may delegate its authority to determine *Gissel* bargaining remedies and impose bargaining orders without detailed review and analysis, certiorari should be granted to provide much needed guidance in this area.

2. National Labor Policy Requires Consistent Central Direction In The Application Of Supervisory Status.

We ask this Court to review the summary affirmance of the NLRB's decision on the issue of Stone's supervisory status for two reasons. First, as a matter of Congressional policy, statutory supervisors are treated differently than employees. Directly related to the Act's §2(11) definition of supervisor is the Congressional declaration found in §14(a) of the NLRA that

> "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but *no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.*" 29 USC §164(a). (Emphasis added).

Section 2(11) and 14(a) when read in conjunction with §2(3) defining "employees", remove all protection from supervisors in respect to self organizational rights under the Act. Employers are thus free to "... discharge supervisors without violating the Act's restraints against discharges on account of labor union membership." *Beasley* v *Food Fair of North Carolina, Inc.*, 416 US 653, 654-655 (1974); *Florida Power and Light Co.* v *Electrical Workers*, 417 US 790 (1974); *American Broadcasting Cos., Inc.* v *Writers Guild of America, West, Inc.*, 437 US 411 (1978).

Examining the legislative and legal basis for exempting supervisors from coverage under the Act, this Court stated

> "Employers were not to be obliged to recognize and bargain with unions including or composed of

> supervisors, because supervisors were management obliged to be loyal to their employer's interests, and their identity with the interest of rank and file employees might impair that loyalty and threaten realization of the basic ends of federal labor legislation. Thus the House Report stated:
>
> * * *
>
> '. . . That no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for any reason, he does not trust.' *Id.* at 17. *Beasley,* supra at 659-661 (footnotes deleted).

After examining the legislative history, the *Beasley* Court observed that:

> " '. . . to accord to the front line of management the anomalous status of employees' . . . would therefore flout the national policy against compulsion upon employers from either federal or state agencies to treat supervisors as employees." *Id.* at 662 (citations omitted; footnote omitted).

Simply stated, an employer is entitled to full loyalty from his supervisors, and if that loyalty is not forthcoming, the supervisor may lawfully be dismissed.

Conversely, following the same rationale, Congressional policy dictates that employees are to be free from supervisory interference with their right to refrain from union support. As was stated in House Report No. 245 on the 1947 legislative amendments leading to supervisory exclusion,

> "The evidence before the committee shows clearly that unionizing supervisors under the Labor Act is

> inconsistent with the purpose of the act to increase output of goods that move in the stream of commerce, and thus to increase its flow. *It is inconsistent with the policy of Congress to assure to workers freedom from domination or control by their supervisors in their organizing and bargaining activities.* It is inconsistent with our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants, but when the foremen unionize, even in a union that claims to be 'independent' of the union of the rank and file, they are subject to influence and control by the rank and file union, and instead of their bossing the rank and file the rank and file bosses them. The evidence shows that rank and file unions have done much of the actual organizing of foreman, even when the foremen's union professes to be 'independent'. Without any question, this is why the unions seek to organize the foremen." H. R. Rep. No. 245, 80th Cong., 1st Sess. 14 (1947), reprinted in Legislative History of Labor Management Relations Act, 1947, at 305 (1974) (emphasis added).

The Board has long held the formation, direction and control of an organizing campaign by supervisors is inherently coercive of employee rights and will disqualify a union utilizing such supervisory support from seeking Board sanctioned bargaining status. *American District Telegraph Company of Pennsylvania*, 89 NLRB 1635, 1637 (1950); *Alaska Salmon Industry, Inc.*, 78 NLRB 185, 188 (1948). Moreover, mere solicitation of union authorization cards by supervisors will taint the showing of interest necessary to support an election petition. *Dexter Foods, Inc. d/b/a Dexter IGA Foodliner*, 209 NLRB 369 (1974).

Indeed, active supervisory participation in support of a union is objectionable conduct which will overturn an election:

> "The vice of supervisory participation in organizing campaigns is that such conduct either may lead employees reasonably to believe that the employer favors the union . . . or, alternatively, may coerce them into supporting a union out of fear of future retaliation by a union-oriented supervisor." *Marcari, Inc. d/b/a El Cabalto*, 250 NLRB No. 9, at p. 3 of slip opinion (1980) (footnotes and citations omitted).

This policy declaration and the significant consequences which flow therefrom, requires clarity in the important delineation of statutory supervisors. Thus, the second reason for review of Stone's supervisory status is that the instant decision creates case law which is inconsistent and at variance with decisions in four circuits, as well as the Sixth Circuit itself, on almost identical facts. *NLRB* v *Porta Systems*, 625 F2d 399 (2nd Cir, 1980); *Schoellkopf Products*, 164 NLRB 660, 666 (1967), aff'd, 410 F2d 82 (5th Cir, 1969); *NLRB* v *Big Ben Department Stores*, 396 F2d 78 (2nd Cir, 1968); *NLRB* v *Trailmobile Division, Pullman, Inc.*, 379 F2d 419 (5th Cir, 1967); *NLRB* v *Publishers Printing*, 625 F2d 746 (6th Cir, 1980); *NLRB* v *Pilot Freight Carriers*, 558 F2d 205 (4th Cir, 1977), cert. den. 434 US 1011 (1978). See also *Keener Rubber*, 142 NLRB 916, 925-927 (1963), aff'd 326 F2d 968 (6th Cir, 1964), cert. den. 400 US 957 (1970).

Symptomatic of the judicial cloud created by the Board's "result-oriented method" of determining supervisory status, Judge Van Graafeiland in his dissent on the subject in *NLRB* v *Porta Systems*, 625 F2d 399 (2nd Cir, 1980), exhaustively surveyed Circuit decisions and complained that:

> "... A comparison of the decisions ... covered will demonstrate the dissimilarities in the Board's approach and the manner in which the Board shifts emphasis among the indicia of supervisory status depending, to some extent at least, upon the purpose for which its appraisal is being made. This result-oriented method of fact-finding should come to an end.
>
> The Board is obligated to administer the Labor Management Relations Act fairly and rationally and to act as an impartial and neutral referee, guarding the right of both employer and employee. It should not act arbitrarily, nor 'treat similar situations in dissimilar ways.' After thirty-three years of Board review, the time has come for sufficient certainty to be brought into the interpretation of sections 2(3) and 2(11) so that those for whom these sections have meaning need no longer act at their peril." *Id* at 405 (emphasis supplied; footnotes omitted).

As an example of this lack of certainty, lead persons with less authority than Stone were found by the Board to be "supervisors", and the Board's decisions were affirmed by the Second Circuit. *NLRB* v *Porta Systems*, 625 F2d 399 (2nd Cir, 1980) and *NLRB* v *Big Ben Department Stores*, 396 F2d 78 (2nd Cir, 1968).

Stone was in sole charge of the second shift and there were no other Company officials present 75% of the time. The second shift employees were told to come to Stone with their problems and were informed that Stone could discipline them, and he, in fact, stopped employees from "goofing off". He also assigned and checked work, approved time off, selected employees for overtime, effectively recommended the hire and lay off of employees, and had a key to the plant,

which he locked up after the end of the second shift. The Sixth Circuit's result here is directly contrary to the Second Circuit's decisions, as well as decisions in other Circuits. See cases cited *supra*. Moreover, considerable importance is attached, in finding supervisory status, to the fact that Stone was the only employee with authority who was present in the plant during the second shift. See *Vega (Crimptex, Inc.)* v *NLRB*, 341 F2d 576, 577 (1st Cir, 1965), cert. den., 382 US 862 (1966); *Keener Rubber* v *NLRB*, 142 NLRB 916, 925-926 (1963), aff'd, 326 F2d 968 (6th Cir, 1964), cert. den. 377 US 933 (1964); *Eastern Greyhound Lines* v *NLRB*, 337 F2d 84 (6th Cir, 1964); *NLRB* v *Supreme Dyeing and Finishing Corp.*, 340 F2d 493 (1st Cir, 1965); *Mon River Towing* v *NLRB*, 421 F2d 1, n 13 (3rd Cir, 1969); *East Bay Newspapers*, 228 NLRB 692, 696 (1977).

Participants in the federal labor arena, their advisors, the lower courts and the Board, will remain at sea, each with different maps and compasses, until consistent central direction is provided as to the confines and boundaries of supervisory status. The course followed on supervisory delineation may very well determine the outcome, such as in this case for review.

CONCLUSION

For the foregoing reasons, Machine Tool and Gear, Inc. prays that this petition for writ of certiorari be granted.

Respectfully submitted.

THE FISHMAN GROUP

By: Steven J. Fishman
And
Malcolm D. Brown
(Donald H. Scharg with
them on the Petition)
Attorneys for Petitioner,
Machine Tool and Gear, Inc.
2550 South Telegraph Road
Suite 107
Bloomfield Hills, MI 48013
(313) 338-8700

APPENDIX A

78-1431

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MACHINE TOOL AND GEAR, INC.
Petitioner

v. ORDER

NATIONAL LABOR RELATIONS BOARD,
Respondent

Before: KEITH and MERRITT, Circuit Judges, and WISEMAN, District Judge*

This cause is before us upon a petition of Machine Tool and Gear, Inc., ("the Company") pursuant to Section 10(f) of the National Labor Relations Act (the Act) as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C., Sec. 151 *et seq.*) to review a Decision and Order of the National Labor Relations Board (the Board) issued on August 25, 1978, and reported at 237 NLRB No. 172. The Board filed a cross-application for enforcement of its Order.

The Board ruled that the Company violated Section 8(1), (3), and (5) of the Act by "laying off", terminating, paying improper "Christmas bonuses" and threatening employees in a manner designed to thwart union organizing within the Company. The Board's Order required the Company to cease

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* Hon. Thomas A. Wiseman, Jr., Judge, United States District Court for the Middle District of Tennessee, sitting by designation.

and desist from the unfair labor practices found. It also required the Company to offer reinstatement to all the employees terminated as a result of the Company's unfair labor practices, to offer back pay to those employees, and to recognize and bargain collectively with the Union.

The Company advances several grounds for its position that the Board's order should not be enforced.

First, the Company contends that the Board's Order with respect to reinstatement of Gregory Stone should not be enforced because the scope of the Act's protection does not cover Stone since he was a supervisor within the meaning of Section 2(11) of the Act. However, the Board found that Stone was not a supervisor, because he was not empowered to exercise the "independent judgment" required by the provision. The Board noted that he did not hire, fire, or discipline, but was a mere conduit for the directions of the Company's actual supervisory personnel.

The determination "[w]hether an employee is a supervisor or not is a question of fact, and the Board's resolution of that issue is conclusive if supported by substantial evidence." *Pulley v N.L.R.B.*, 395 F2d 870, 875 (6th Cir. 1968). The Board's finding of fact here is supported by substantial evidence.

Second, the Company contends that the Board did not violate the Act by coercively interrogating or threatening employees, by laying them off, or by terminating them or by paying "Christmas bonuses" designed to hinder union organizing. Again, however, the Board's findings are supported by substantial evidence.

The Company also contends that the Board's finding that it failed to recognize and bargain with the Company in violation of Section 8(a)(5) and (1) of the Act is in error because the

alleged misrepresentations by Union organizers to the non-English speaking and illiterate company workers prevented the acquisition of actual majority support for the Union. However, the Board's finding that there were no misrepresentations outside the standard set out in *N.L.R.B.* v *Gissel Packing Co. Inc.*, 395 U.S. 575 (1960) is again supported by substantial evidence.

Finally, the Company argues that the Bargaining Order issued by the Board is improper. This Court finds that the Board's issuance of the Bargaining Order to remedy the Company's unfair labor practices is not an abuse of the discretion given the Board under §10(c) of the Act. *See N.L.R.B.* v *Gissel Packing Co., Inc., supra, N.L.R.B.* v *Production Industries, Inc.*, 425 F2d 1206 (6th Cir. 1970) and *N.L.R.B.* v *Gordon Mfg. Co.* 395 F2d 668 (6th Cir. 1968).

Upon a review of the record as a whole, the court is of the opinion that substantial evidence supports the findings of the Board, and that it did not abuse its discretion in issuing its Order. Accordingly, the Order of the Board is enforced.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

ISSUED AS MANDATE: OCTOBER 22, 1980
COSTS: TO BE RECOVERED BY
RESPONDENT ... $286.62

A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk
By: /s/ Audrey Crochett
Deputy Clerk

APPENDIX B

DECISION AND ORDER

(August 25, 1978)

On February 27, 1978, Administrative Law Judge Bernard Ness issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3 (b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, finding,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

The Administrative Law Judge found, *inter alia*, that Respondent violated Section 8 (a) (1) of the Act by interrogating employees concerning their union activities or the union activities of other employees, by threatening plant closure if the Union was selected as the bargaining representative, by threatening employees with discharge or failure of reinstatement, and by granting a Christmas bonus to induce

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[1] The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

the employees to renounce the Union. The Administrative Law Judge also found that Respondent violated Section 8 (a) (3) of the Act by discharging Stephen Stanley and Gregory Stone and by laying off or terminating certain employees. We agree with the Administrative Law Judge's findings.

In view of Respondent's substantial violations of the Act, we also agree with the Administrative Law Judge's finding that a free and fair election is unlikely in the circumstances of this case. Accordingly, we adopt his recommendation that a bargaining order be issued to remedy the Respondent's unfair labor practices. Unlike the Administrative Law Judge, however, we find that Respondent's bargaining obligation began on January 14, 1977, the date the record establishes that the Union, having previously secured majority support in the appropriate unit,[2] demanded recognition in the context of Respondent's contemporaneous course of unlawful conduct.

In connection with the foregoing findings, we also find that Respondent violated Section 8 (a) (5) of the Act by refusing to recognize and bargain with the Union on and after January 14, 1977. Although the complaint did not specifically allege a violation of Section 8 (a) (5), the record discloses that the issue was litigated at the hearing. Thus, the complaint alleged, *inter alia*, that a majority of the employees in the appropriate unit had designated the Union as their exclusive bargaining representative by on or about November 24, 1976, and that Respondent engaged in various conduct violative of Section 8 (a) (1) and (3) in order to undermine the Union's status and

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[2] All full-time and regular part-time production and maintenance employees employed by the Employer at its facility located at 2801 S. Beech Daly, Dearborn Heights, Michigan, but excluding salespersons, guards and supervisors as defined in the Act.

render an uncoerced election impossible. In support of this allegation, as well as the General Counsel's theory that a remedial bargaining order is necessary, the record contains the Union's demand for recognition in the form of a letter dated January 12, 1977, testimony that Respondent received the Union's demand on January 14 but failed to respond, and the authorization cards signed by 23 of 40 employees in the appropriate unit.[3] Accordingly, all of the elements necessary to prove a violation of Section 8 (a) (5) of the Act were fully litigated and established with respect to the General Counsel's theory that a bargaining order is necessary to remedy the unfair labor practices, effective January 14, 1977, the date of the demand for recognition.[4]

AMENDED CONCLUSIONS OF LAW

In accord with the above findings we adopt the Administrative Law Judge's Conclusions of Law, with the following modifications:

Insert the following as new Conclusions of Law 5 and 6, renumber the present conclusions 5 and 6 as 8 and 9, and delete present conclusion 8.

5. At all times material herein, since November 24, 1976, the Union has been the exclusive representative of the

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[3] We find no merit in Respondent's exceptions regarding the validity of certain cards. Thus, we adopt the Administrative Law Judge's finding that Stone is not a supervisor; hence the cards he obtained are valid. Furthermore, we find no evidence that any card signer was told that the sole purpose of the card was to obtain an election.

[4] *W & W Tool & Die Manufacturing Co.*, 225 NLRB 1000 (1976); *Red Barn System, Inc.*, 224 NLRB 1586 (1976).

employees in the below-described appropriate unit within the meaning of Section 9 (a) of the Act.

6. By refusing, since January 14, 1977, and at all times thereafter, to recognize and bargain with the Union as the exclusive representative of its employees in the appropriate unit set out below, Respondent has engaged, and is engaging, in unfair labor practices within the meaning of Section 8 (a) (5) and (1) of the Act.

ORDER

Pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent Machine Tool and Gear, Inc., Dearborn, Michigan, it officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as modified below:

1. Insert the following as paragraph 1 (f) and renumber present paragraph 1 (f) accordingly:

(f) Refusing to bargain collectively with the above-named Union as the exclusive bargaining representative of the employees in the following unit:

> All full-time and regular part-time production and maintenance employees employed by the Employer at its facility located at 2801 S. Beech Daly, Dearborn Heights, Michigan, but excluding salespersons, guards and supervisors as defined in the Act.

2. Substitute the attached Notice for that of the Administrative Law Judge.

Dated, Washington, D.C. August 25, 1978.

John H. Fanning, Chairman
Howard Jenkins, Jr., Member
John A. Penello, Member
(Seal) National Labor Relations Board

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

WE WILL NOT coercively interrogate employees about their or other employees' union activities or sympathies.

WE WILL NOT threaten to close the plant if our employees select International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, or any other labor organization as their collective-bargaining representative.

WE WILL NOT threaten to discharge or to not reinstate employees because of their union activities or sympathies.

WE WILL NOT grant employees a Christmas bonus or any benefits in an attempt to undermine the above-named labor organization or any other labor organization.

WE WILL NOT discourage union membership or activities or other concerted activities by our employees by discharging, laying off, or otherwise discriminating

against them in regard to hire and tenure of employment or in regard to any other term or condition of employment because of the activities of our employees in behalf of the above-named Union or any other Union.

WE WILL NOT refuse to recognize and bargain with the above-named Union as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-named Union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection or to refrain from any or all such activities.

WE WILL offer the following named employees immediate and full reinstatement to their former jobs or, if such jobs are no longer available, to substantially equivalent jobs, without prejudice to their seniority and other rights and privileges and WE WILL make them whole for any loss of earnings they may have suffered as a result of our discrimination against them, together with interest.

Gregory Stone
Nabil Ajami
Ibrahim Aboul-Hassan
Ali Dakroub
Mustfa Fawaz
Stephen C. Stanley
Mohamad Harajly
Robert Harris
Kirk Hulett
Daniel Jaime
Peter Jaime
Betty Khalaf
Dennis Ladanyi
Kenneth LeBlanc
Ronald Thornton
Khalil Zaban

WE WILL recognize, and upon request, bargain collectively with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, as the exclusive representative of the employees found herein to constitute an appropriate unit, and, if an understanding is reached, embody such agreement in a signed contract. The bargaining unit is:

> All full-time and regular part-time production and maintenance employees employed by the Employer at its facility located at 2801 S. Beech Daly, Dearborn Heights, Michigan, but excluding sales-persons, guards and supervisors as defined in the Act.

Machine Tool and Gear, Inc.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Patrick V. McNamara Federal Building, 477 Michigan Avenue, Room 300, Detroit, Michigan 48226, Telephone 313-226-3244.

APPENDIX C

DECISION

(February 27, 1978)

Statement of the Case

BERNARD NESS, Administrative Law Judge: The unfair labor practice charge was filed on January 24, 1977, by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, herein called the Union. The complaint was issued on March 7, 1977, alleging that Machine Tool and Gear, Inc., herein called the Respondent, violated Section 8 (a) (1) and (3) of the Act. The complaint, as amended, also requested a bargaining order. The Respondent has denied the commission of any unfair labor practices. Hearing was held before me at Detroit, Michigan on May 25-27, 1977.

Upon the entire record, including my observation of the witnesses and their demeanor, and after due consideration of the briefs filed by the General Counsel and the Respondent, I hereby make the following:

Findings of Fact

* * *

III. The Unfair Labor Practices

A. *Background*

The Respondent supplies small automotive parts to the Big Three automobile manufacturers through competitive bidding. It receives purchase orders for the parts to be supplied. There are two types of purchase orders. One is the spot order whereby the Respondent is to ship a specific number of parts

to the automobile manufacturer. The other type of purchase order is through a 1-year contract whereby Respondent is to supply a certain percentage of a designated part. About once a month, the Respondent receives from the manufacturer authorization to ship a set number of parts each week.

Joseph LeBlanc is the president and the sole stockholder of the Respondent. His son, Timothy LeBlanc, is the general manager. Another son, Thomas, is also listed as a general manager.[1] Another son, James, is a machine operator. Al Berry, the shop superintendent, and Jim Keener, foreman on the morning shift are admitted supervisors. During the period relevant to this proceeding, the Respondent operated two shifts—the morning shift was from 7 a.m. to 3:30 p.m. and the afternoon shift was from 3:30 p.m. to midnight. One of the issues to be determined is the supervisory status of Greg Stone who was on the afternoon shift. The Respondent contends he was a supervisor.

Employees began signing Union authorization cards on November 22, 1976.[2] The cards were distributed by Stephen C. Stanley, Jr., and Gregory Stone. On November 24, 23 cards had already been signed.[3] On November 29 and 30, the Respondent laid off the entire afternoon shift. The General Counsel contends the layoff of the afternoon shift employees and of two employees on the day shift, David and Peter Jaime, violated Section 8 (a) (1) and (3) of the Act. The General Counsel also contends the terminations of Stone and Stanley on December 2 was attributable to their Union activities and violated Section 8 (a) (1) and (3) of the Act. The General

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[1] General Counsel's Exhibit 3.

[2] Unless otherwise indicated, all dates hereinafter refer to 1976.

[3] As more fully discussed below, there were 40 employees in the unit at that time.

Counsel also contends that Respondent further violated Section 8 (a) (1) and (3) by issuing two warnings to Michael J. Champeau. The General Counsel further alleges the Respondent violated Section 8 (a) (1) by various acts of interference, restraint and coercion, including the grant of a Christmas bonus. The General Counsel contends the Respondent's unfair labor practices are so substantial in nature and so pervasive in character as to render nugatory the holding of a fair representation election and an effective remedy should include a bargaining order.

B. *The Supervisory Status of Gregory Stone*

Stone began his employment with the Respondent in February, 1973. For about a 2-year period prior to his termination on December 2 he was in charge of the afternoon shift. He was one of the senior employees in terms of years of service and was hourly rated. There were approximately 10 machine operators on the afternoon shift. His responsibility was to see that the machines were running and the parts were printed. He, himself, would grind tools to be put in the screw machine. In a typical day this would take about 1-½ hours. He also helped load and unload trucks. He would attempt to fix minor breakdowns on machines. He also checked to see that parts were printed properly and if employees were standing around talking he would tell them to return to work. The same machine operations are performed on both shifts. When the afternoon shift employees reported to work, cards were on their machines and the operators knew by looking at the card how much production was required. When the operator ran out of work or parts, they look to Stone for further work. Both Shop Superintendent Berry and Foreman Keener were on the first shift but stayed on for about 2 hours into the afternoon shift. Stone would be briefed by Berry or Keener what parts needed to be run and the machines to be operated on a given

day. When the occasion arose, Stone would move people to machines to be operated, based on which parts needed to be printed that day. He knew the persons who could run specific machines. He had a key for the plant and locked up at the end of the shift. On occasion, when Keener was absent or on vacation, Stone would substitute for him on the morning shift. Stone had recommended the hiring of several persons and, as he testified, when openings later arose they were hired by higher authority.[4] The above is based upon the credited testimony of Stone, supported in pertinent part by employees Harris and Khalaf. General Manager Tim LeBlanc also testified concerning Stone's alleged supervisory status. I was not impressed with his demeanor and his responses to questions were often evasive. On direct examination, he first testified Stone had the authority to hire employees. In response to further questioning, he replied as follows:

> THE WITNESS: He would tell us, myself or Al Berry, or Jim Keener, that so and so was coming in and putting in an application. And he knows the person. And he would like to see them hired. And on many occasions we hired that person.
>
> JUDGE NESS: He did not hire them, though, did he? Or did he? Are you telling us he merely recommended the person to be hired. Or, in other words, the question really is, did he ever hire anyone?
>
> THE WITNESS: Yes, he has contacted applicants and told them they have a job. Please show up on a certain shift.

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[4] Employee Stanley testified he had recommended the hiring of an individual and the person was thereafter hired.

JUDGE NESS: Did he do this on his own without clearing with anyone else in management?

THE WITNESS: No. It was cleared with other management. Many, many applications are cleared with other management.

LeBlanc also testified Stone had the authority to discharge a person without clearing the action with other management officials. When asked on what he based his answer, he testified as follows:

THE WITNESS: Well, one night he sent Samuel Thompson home. He was an employee at our shop. And he sent Samuel Thompson home. And the next day he came into my office and he said. I do not ever want to see that person back here in the shop again. He told me of an incident where one of the—Sammy Thompson pulled a knife on one of the other machine operators.

JUDGE NESS: That's why he sent him home?

THE WITNESS: Right.

JUDGE NESS: Who did he tell that to?

THE WITNESS: Myself.

JUDGE NESS: What did you then do?

THE WITNESS: Well, I agreed with him. I said, fine. The man's employment here is terminated.

JUDGE NESS: So your discharged Thompson?

THE WITNESS: No, Greg did.

JUDGE NESS: He sent him home. Isn't that what you just said?

THE WITNESS: Yes. Greg came to my office and said he did no want him back any more.

JUDGE NESS: So then you discharge him, didn't you? Thompson was home.

THE WITNESS: Correct.

JUDGE NESS: All right, now, let me ask you this. What is that same incident occurred, Thompson pulling a knife on someone, and it was an employee who reported it to you, would you have discharged Thompson?

THE WITNESS: No. I would have gone and gotten more information from other employees.

JUDGE NESS: To find out if it happened?

THE WITNESS: Correct.

JUDGE NESS: If it did happen you would have discharged Thompson?

THE WITNESS: Definitely.

Stone had testified that on one occasion he recommended to Berry that another employee (Garcia) be discharged. Berry then spoke to the employee and he was not disciplined. Shop Superintendent Berry testified as a witness for the Respondent. Apart from saying Stone was the "foreman" on the afternoon shift he was not questioned about Stone's responsibilities. I find that Stone did not possess the attributes of a supervisor under the Act but for the most part was a conduit for the management officials, Tim LeBlanc, Berry and Keener. Any authority he exercised over the employees in directing or assigning their work originated from the management officials and was within the Respondent's guidelines, not requiring the use of independent judgment. I find that by virtue of his skills he was more in the nature of a leadman on the afternoon shift when supervisors were not present during a major part of the shift. Accordingly, I find that Stone was a nonsupervisory employee.

C. *Independent Acts of Interference, Restraint and Coercion*

1. Stone credibly testified without refutation that one evening he called Berry at home from the plant to ascertain the whereabouts of some parts. In this conversation, Berry told him that Tom LeBlanc wanted to fire Stanley earlier that day because of Stanley's union activities but he had dissuaded Tom LeBlanc from taking such action.[5] I find such conduct constituted a threat of discharge for union activities in violation of Section 8 (a) (1) of the Act.

2. Stone credibly testified without refutation that on about November 24, he asked Keener if he wanted to sign a union card. Berry came up and said he was positive the plant would close down if a union came in. Such statement constituted an unlawful threat of plant closure because of union activities and was violative of Section 8 (a) (1) of the Act.

3. On November 29, Stone called into the office by Tim LeBlanc.[6] Berry was also present but remained silent. Tim LeBlanc asked Stone what he thought of the Union that Stanley was discussing. Stone replied he supported Stanley and mentioned more benefits could be obtained with the Union. Stone was asked if he had been passing out union cards and he admitted it. LeBlanc then suggested he ought to get a job with a company where a union represented the employees.[7] I find such interrogation violative of Section 8 (a) (1).

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[5] Stone placed this conversation as having taken place between the time union cards were first passed out and his termination. (November 22-December 2.)

[6] Stone was on the morning shift on this date.

[7] Based upon a composite of the testimony of Stone and LeBlanc.

4. Stanley credibly testified without refutation that Berry came up to him, pulled out a blank card and asked him what "the deal" was. Berry also told Stanley if the Union came in the Respondent would close down and move out.[8] I find Berry's questioning a form of unlawful interrogation and the threat of plant closure likewise unlawful and violative of Section 8 (a) (1).

5. Robert Harris was a machine operator on the afternoon shift and was laid off on November 30. On Monday, December 6, Keener spoke with him on the telephone. Keener told him Audrey Champeau, a machine operator, had requested to be laid off and he asked if Harris wanted to return and operate her machine. Harris replied he wanted to return. Keener then asked him if he had signed a union card and had gone to the Union meeting. Harris responded he had not. Then Keener said he would talk to Tim LeBlanc and would call him back. About 20 minutes later, Keener again telephoned and told Harris that Tim LeBlanc had approved his return to work on the day shift. Harris returned to work the following day, December 7. Keener was not called as a witness by the Respondent although he was present at the hearing at some period during Respondent's presentation of its case. Harris' testimony is credited. I find that not only did Keener's comments constitute unlawful interrogation but implicit in his statements was a clear threat that Harris would not be reinstated if he had engaged in union activities. I find such conduct violative of Section 8 (a) (1).

6. Michael Champeau has been employed as a machine operator on the day shift since August, 1976. He signed a

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[8] Stanley placed these statements as having been made after cards were being signed and before he was terminated. (November 22-December 2.)

union card on November 23. A union meeting was held in early December. Champeau credibly testified, without refutation, that about 2 days after the Union meeting, Berry asked him if he had been to the Union meeting. After Champeau admitted he had attended, Berry asked him if anyone still working at the plant had also been there.

Champeau also testified that about 1 or 2 weeks after the Union meeting, Tim LeBlanc came up to him and said he had heard about the Union meeting. He asked Champeau if the laid off employees had been there and Champeau replied they were there. LeBlanc then asked if any of the employees still working at the plant had attended the meeting. Champeau responded he had been the only one in attendance of the employees still working. LeBlanc admitted the interrogation. I find the interrogation by Berry and Tim LeBlanc violative of Section 8 (a) (1) of the Act.

7. *The Christmas bonus.* By letter dated December 23 to the employees, the Respondent announced and distributed a bonus check to the employees "for your continuing hard work and loyalty during the past year."[9] The amount received by each employee was equivalent to 40 hours pay. The General Counsel contends the granting of the Christmas bonus was designed to encourage the employees to reject the Union. It is undisputed that this was the first time since the 1960s that a cash Christmas bonus was given to employees. Tim LeBlanc testified that the 1976 profit picture was the best since the last time a cash bonus was given. He stated there was a 2 percent increase of profit over sales compared to 1976 but did not know what the actual dollar amount of profit was for either year. He testified the decision to grant a cash bonus was made

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[9] General Counsel's Exhibit 3.

by his father, Respondent's president and sole stockholder, on the weekend of December 11, or 18. Stone, who had been with the Respondent since February, 1973, credibly testified that in 1973 the employees received a turkey on Thanksgiving and a ham at Christmas. In 1974 the employees only received a turkey on Thanksgiving. In 1975 the employees received nothing. Michael Champeau who started in August 1976, also received a full week's pay as a Christmas Bonus in December.

The one person who made the decision to grant the bonus, Joseph LeBlanc, was not called by the Respondent to explain his reason for granting the bonus—the first time in at least 6 years that a cash bonus had been given, and the first time in 3 years that any form of Christmas bonus had been given—and at that time it was a ham. In 1976, even employees with only a few months' service with the Respondent received a full week's pay. It should be noted that on Thanksgiving 1973, the employees received turkeys and again in 1974. In 1975 they received nothing. In 1976 they did not receive a turkey at Thanksgiving. At that time the LeBlancs were unaware that a union campaign was in progress. Tim LeBlanc testified it was the weekend following Thanksgiving while he was at his father's home "up north" when his brother Tom telephoned to report that a union organizing campaign was going on.

I am convinced that the Christmas bonus given to the employees was intended to influence the employees to reject the Union and such action violated Section 8 (a) (1) of the Act.

8. No evidence was presented to support the Section 8 (a) (1) allegations contained in Paragraph 9 (c), (f) or (i) of the complaint and they are dismissed.

D. *The Discharge of Gregory Stone*

Stone was discharged on December 2. I have found *supra* he was a nonsupervisory employee. Along with employee Stanley, he solicited employees to sign union cards. He, himself, signed one on November 22. Tim LeBlanc was at his father's home about 280 miles from Detroit from November 24 until he returned to the plant on Monday, November 29. On the evening of November 24, Tom LeBlanc telephoned and apprised his father and Tim that an organizing campaign was going on. That weekend when Tom came to his father's home he reported to his father and Tim that Stone was passing out union cards. When Tim LeBlanc returned to the plant on November 29, he confronted Stone who admitted he had passed out cards and favored the Union. Stone was working on the day shift that day. It was on November 29 and November 30 that the layoffs took place. On December 2, Stone was terminated. In his direct examination, Tim LeBlanc's initial explanation for the discharge of Stone was unconvincing. He first testified he discharged Stone because of his bad attitude and interference with production. He stated Stone did not conduct the shift in an effective manner, there had been a gradual letdown starting in the summer of 1976, and Stone would carry on lengthy conversations with employees. He then conceded the primary reason for the discharge was because Stone had passed out union cards. I have no doubt that had Stone not participated in union activities and not passed out union cards, he would not have been terminated. Accordingly, I find that the discharge of Stone violated Section 8 (a) (1) and (3) of the Act.

E. *The Discharge of Stephen Stanley*

Stanley had been employed by the Respondent from October, 1975 until his discharge on December 2, only days after

the substantial layoff. He worked on the day shift in the back end of the plant. Both Stone and he were instrumental in initiating the Union interest among the employees and solicited the employees to sign cards. His card was signed on November 22. Tim LeBlanc testified Stanley was terminated because he "was a constant harassment to the management and other employees." According to LeBlanc, Stanley constantly talked to employees and to management during working time about irrelevant things, constantly played a radio loudly in the plant thus disturbing other employees,[10] and several times Stanley's conversations were so unusual and he characterized Stanley as "such as a person who might possibly be under the influence of an alcohol or drug or something of that nature.[11] He stated that many times Stanley marked up company notices and posted signs. Tim LeBlanc's reasons for terminating Stanley were unconvincing. He painted a picture of Stanley playing a radio loudly, being told innumerable times to remove it, and yet Stanley continually brought the radio back and then continued to play it loudly. Similarly, Stanley was depicted as having been told numerous times about posting signs. When asked why the Respondent did not take disciplinary action at an earlier date, Tim LeBlanc responded, "But the only reason I finally terminated him is because I realized that the man had no response to anything from management."

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[10] Employee Childress, a witness for the Respondent, testified he complained to Berry about the loudness of the radio shortly after Stanley came to work. Stanley began his employment back in October, 1975. Childress further testified the radio was loud "more often than not." David Harris also testified he complained at times to management about the radio but then Stanley would resume.

[11] Employee David Jones testified about his suspicions concerning Stanley's alleged use of drugs. His testimony is unconvincing and no reliance is placed upon his testimony. In any event, he did not report his suspicions to management.

Stanley was discharged on Thursday, December 2. He was about to leave the plant when Tim LeBlanc called him into the office. Tim told Stanley he was terminated because he was stirring up a commotion among the workers. Stanley replied that the Company's action was unlawful. Tim responded he had checked around and the Company was advised this was the best way to handle it.[12] Tim LeBlanc's testimony concerning any belief that Stanley favored the Union prior to his termination was far from candid. He initially testified that Berry reported to him that "Steve [Stanley] was interested in starting the Union." He then testified he had no reason to believe that Stanley favored the Union—even after Berry's report to him. His explanation—"I did not have first hand information. I had none and I don't make decisions on hearsay." Then he conceded he suspected Stanley favored the Union. It should be noted, too, that when Tim LeBlanc spoke to Stone on November 29 about passing out cards, he referred to Stanley's union activity.

Tim LeBlanc testified that when the Respondent has economic layoffs, it uses this opportunity to layoff undesirable employees. He portrayed a clear picture of an undesirable employee over a long period of time in his testimony concerning Stanley. Yet there was a sizeable layoff on November 13, 1975, and another layoff on September 26, 1976. Stanley was not laid off on either occasion. Nor was he selected in the alleged economic layoff at the end of November, 1976. It was only several days later that he was terminated. He was discharged on the same day as Stone. I am convinced that when Tim LeBlanc told Stanley he was being terminated for "stirring up a commotion among the employees," he had reference to Stanley's solicitations of employees to sign

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[12] Based on the credited testimony of Stanley.

authorization cards and support the Union. Accordingly, I find that the Respondent discharged Stanley because of his protected activities and thereby violated Section 8 (a) (1) and (3) of the Act.

F. *The Layoff*

On November 29 and 30, the entire afternoon shift was laid off together with a number of employees on the day shift. The General Counsel contends the layoff of the entire second shift and two employees on the day shift, Daniel and Peter Jaime, was because of the Union interest engendered by employees and thus violated Section 8 (a) (1) and (3) of the Act.

As of November 24, there were 40 employees on both shifts. In the front end of the plant, the Respondent produced parts relating to the pump shaft. In the back end of the shop, various other parts were produced. As of November 29, an equal number of machine operators on each shift worked in the front end on the rotor shaft, 10 each in number. A part-time employee, Ken LeBlanc, was the only employee in the back end of the plant on the afternoon shift. Tim LeBlanc testified the layoff on November 29 and 30 was because of a tremendous cutback in the pieces to be shipped to Ford. This affected the front end of the shop. He decided to eliminate the entire afternoon shift and took this opportunity to terminate undesirable employees on the day shift. He testified that on November 22 he received a shipment release from Ford announcing shipping dates from December 1 through February, 1977, in specific quantities of a rotor shaft.[13] According to Tim LeBlanc he reasoned that the number of parts required by Ford weekly could be produced on one 10-hour day shift over a 5-day period.[14] He therefore decided to layoff the entire afternoon shift and also decided to terminate Daniel and

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[13] Respondent's Exhibit 4.

[14] The morning shift had been working an 8-hour day.

Peter Jaime at the same time because of their attendance records. They were machine operators on the day shift. In essence, the Respondent claims an economic defense—Ford cut its requirements for parts, the Respondent claims it could have produced the number of parts required on one 10-hour shift and thus the layoff.

The Respondent's reasons do not stand up under scrutiny. Respondent's Exhibit 4, disclosed shipping dates of 24,011 parts each for December 1, 6, 13 and 20 and 29,539 each for January 3 and January 10, 1977. It noted December requirements must arrive at the Ford plant no later than December 22. This shipping release was received by the Respondent on November 22. Respondent's Exhibit 3, another Ford shipment release dated October 28 and received by the Respondent on November 2 discloses that on a projected basis, the quantities to be shipped on December 1 and 6 were each for 22,393 pieces—less than on the shipping release received on November 22. This same earlier shipment release did not specify any parts to be shipped in December after December 6 whereas the later shipment release called for 48,022 to be shipped after December 6 up until December 22. The earlier shipment release also called for an equal number of the part—9,098—to be shipped weekly from November 1 through 22. Tim LeBlanc testified one shift could produce 20,000 parts during 40-hour week. He did not explain why there was no layoff prior to November 29 even though the call for parts was considerably lower during the entire month of November and Respondent was aware of this low production requirement by November 2. The Respondent points to layoffs in prior years, contending there is a seasonal drop off of production required at that time of year. Respondent's Exhibit 6 shows layoffs of employees since December 13, 1974. Layoffs occurred during different parts of the year. On November 13, 1975, there was a layoff of 14 employees, all

but 2 were recalled and most of them were recalled by November 24. Employees Audrey Champeau, Lillian Fox and Peter Jaime all credibly testified without contradiction they were all laid off at that time and the layoff was attributable to the breakdown of the rotor flow machine. There was no later layoff in 1975.

The timing of the November 29-30 layoff suggests a reason other than economic in light of the fact that at the beginning of November there was a sharp drop in the parts to be shipped. It should be remembered that Tim LeBlanc was with his father "up north" from November 24 until he returned to the plant on Monday, November 29. That is when he questioned Stone about the Union campaign. He was aware Stone had been passing out cards. It was on that very day that the afternoon shift employees were telephoned and precipitously told they were laid off and not to report that very afternoon. Of the 14 employees laid off on November 29 and 30, 2 were recalled that same week. Three more were recalled the following week and four more were recalled at later dates. Two new employees were hired as machine operators on December 9 and 20. LeBlanc did not adequately explain why five employees were recalled within 2 weeks of the layoff and two new employees were hired in December,[15] this despite the projected cutback covering a period throughout December. He testified the complement remained the same on the day shift after the layoff. Here too, the facts do not support his testimony. Only 6 of the 14 were recalled during December.[16]

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[15] A third employee was hired to replace one newly hired employee who quit.

[16] One of the six, Harris, was recalled to replace Audrey Champeau who had requested to be laid off.

Others were recalled in January. At one point, Tim LeBlanc testified that the afternoon shift was reinstituted in early May, 1977, but then modified his answer when it was brought to his attention that his records showed that employees were working on the afternoon shift in January and February, 1977, albeit in the back end of the plant.

As stated above, Respondent's defense concerning the November 29-30 layoffs is unconvincing. Union cards were signed on November 22-24. Tim LeBlanc and his father were alerted of the Union campaign and that Stone was passing out cards. Immediately upon Tim's return to the plant on November 29, Stone confirmed his interest in and activity on behalf of the Union. That very day, Tim began laying off people precipitously, to the point of the afternoon shift employees being called at their home that same day and told not to report to work. It matters not whether the Respondent was aware of the identity of the individual card signers. Suffice it to say, the Act is violated when an employer terminates or lays off employees because of union interest among employees regardless of their individual activities. I am convinced that such was the motivation for the Respondent's actions here. Accordingly, I find that the Respondent violated Section 8 (a) (1) and (3) of the Act when it laid off or terminated 14 employees on November 29-30.[17] Only 5 of the 14 were never recalled. The Respondent contends both Daniel and Peter Jaime were laid off and not recalled because of their attendance records. Their records were not spotless but I am convinced they were included in the group because of the

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[17] Nabil Ajami, Ibrahim Aboul-Hassan, Ali Dakroub, Mustfa Fawaz, Mohamad Harajly, Robert Harris, Kirk Hulett, Daniel Jaime, Peter Jaime, Betty Khalaf, Dennis Ladanyi, Kenneth LeBlanc, Ronald Thornton, and Khalil Zaban.

Respondent's unlawful motivation. To put it another way, had the employees not shown their interest in the Union, the Jamie brothers would not have been laid off.

G. *The Discipline of Michael Champeau*

Michael Champeau has been last employed by the Respondent since August, 1976, as a machine operator on the day shift.[18] He signed a union card on November 23 at the plant in the presence of Keener. As described above, in December he admitted to Berry and Tim LeBlanc he had attended a union meeting. By letter dated January 12, 1977, the Union requested recognition.[19] Champeau testified that shortly after this letter was sent to the Respondent, Tim LeBlanc told him he was messing up on production because he was going around talking to other employees. Champeau was also told his attendance record was not good. About 4-5 weeks later, Champeau was observed by Tim LeBlanc talking to employee Harris at Harris' machine. When Champeau returned to his own machine, Tim LeBlanc came up and told him he was talking too much again and interfering with production. Tim said this was the second warning. Champeau also testified that on othere occasions employees, including himself, were told they were talking too much and to return to their work. Although the Respondent was aware since early December that Champeau supported the Union, I believe the evidence is insufficient to establish that Tim LeBlanc's criticism of Champeau was in retaliation for the union activity. Accordingly, I shall dismiss this allegation of the complaint.

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[18] He had worked for the Respondent on two or three other occasions.

[19] General Counsel's Exhibit 2.

H. *The Bargaining Order*

The complaint, as amended, does not allege a violation of Section 8 (a) (5) of the Act. However, the General Counsel contends that because of the nature of the unfair labor practices, a remedial order should require a bargaining order.

The parties are in agreement as to the description of the unit, defined in the complaint as follows:

> All full-time and regular part-time production and maintenance employees employed by the Employer at its facility located at 2801 S. Beech Daly, Dearborn Heights, Michigan, but excluding salespersons, guards and supervisors as defined in the Act.

The Respondent contends that the unit should not include the truckdriver, Thomas Stencel. The testimony discloses Stencel loads and unloads trucks, performs janitorial duties and also drives a company vehicle but does not perform any over-the-road driving. He spends about 2-3 hours a day in the plant. He is the sole employee who does any driving. I find that he properly belongs in the appropriate unit. The parties are also in disagreement with the eligibility of two individuals, Gregory Stone and James LeBlanc. I have found, *supra*, that Stone was a nonsupervisory employee and thus properly is included in the appropriate bargaining unit. James LeBlanc is still another son of Joseph LeBlanc, the sole owner of the business. James is listed as a machine operator. As James LeBlanc is an "individual employed by his parent" within the meaning of Section 2 (3) of the Act, he is excluded from the bargaining unit.[20]

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[20] *Missouri Electric Works, Inc.*, 212 NLRB 124; *Foam Rubber City # 2*, 167 NLRB 623.

As of November 24, the Union has 23 properly authenticated and valid authorization cards of employees in the appropriate bargaining unit.[21] On this same date, there were 40 employees in the appropriate bargaining unit. Listed in General Counsel's Exhibit 4 are the names of 40 individuals. The parties disagreed as to the eligibility of James LeBlanc and Thomas Stencel, whose names appear on the list. The General Counsel contends that Stone should have been added to the list. Based on my findings, *supra*, Stencel is properly included, James LeBlanc is excluded and Stone should be included. I find that as of November 24, a majority of the employees in the bargaining unit described above had designated the Union as their exclusive representative for purposes of collective bargaining with the Respondent. It was not until January 12, 1977, that the Union formally requested recognition.

In *N.L.R.B.* v *Gissel Packing Co., Inc.*, 575 (1969), the Supreme Court approved the Board's use of bargaining orders to remedy an employer's independent 8 (a) (1), (2), or (3) violations which undermined a union's majority status and fatally impeded the holding of a fair election. In doing so, the Court depicted two situations in which such orders could appropriately be given. The first involves unfair labor practices which are so "outrageous" and "pervasive" that traditional remedies cannot erase their coercive effect, with the result that a fair election is rendered impossible. In this connection the Court noted that the Board itself had a "similar policy of issuing a bargaining order, in the absence of an 8 (a) (5) violation or even a bargaining demand, when that was the only available effective remedy for substantial unfair labor prac-

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[21] General Counsel's Exhibit 12-21, 24-26, 28-37.

tices." The second, or intermediate type is described by the Court as follows at 614-615:

> The only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes. The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should reemphasize, where there is also a showing that at one point the union had a majority; in such case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior. In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight, and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

In the present case, the Union achieved majority status as of November 24. At this time the Respondent embarked upon a course of unlawful conduct designed to sap any interest by the employees in the Union. Respondent coercively interrogated employees concerning union activity, threatened to close the plant, and upon Tim LeBlanc's return to the plant on November 29, the Respondent thereupon eliminated the entire afternoon shift and unlawfully laid off 14 employees in the 2-day period in retaliation for the interest shown by

employees in the Union. And only days later, the Respondent unlawfully discharged the two employees who initiated the Union campaign and had solicited the other employees to sign union authorization cards. Respondent's unfair labor practices described above were both extensive in nature and impact. A natural consequence of such conduct was to instill fear in the employees, to stifle further interest in the Union and to dissipate the Union's majority status already achieved. A fair election cannot, after such conduct, be insured by the use of traditional remedies and the authorization cards signed before the commencement of the unfair labor practices provide a more reliable test of the employees' desires and better protect the employees' rights than would an election.[22] In light of the foregoing, I shall recommend that the Respondent recognize and, upon request, bargain collectively with the Union as the exclusive representative of the employees found herein to constitute an appropriate unit.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate and substantial relationship to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

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[22] *Boston Pet Supply, Inc.*, 227 NLRB No. 277.

2. The Union is a labor organization within the meaning of Section 2 (5) of the Act.

3. By interrogating employees concerning their union activities or the union activities of other employees, by threatening plant closure if the Union was selected as the bargaining representative, by threatening employees with discharge of failure of reinstatement, and by granting a Christmas bonus to induce the employees to renounce the Union, Respondent violated Section 8 (a) (1) of the Act.

4. By discharging Stephen Stanley and Gregory Stone, and by laying off or terminating the following named employees, Respondent has violated Section 8 (a) (3) and (1) of the Act:

Nabil Ajami	Daniel Jaime
Ibrahim Aboul-Hassan	Peter Jaime
Ali Dakroub	Betty Khalaf
Mustfa Fawaz	Dennis Ladanyi
Mohamad Harajly	Kenneth LeBlanc
Robert Harris	Ronald Thornton
Kirk Hullett	Khalil Zaban

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

6. Except as is set forth above, the General Counsel has not established by a preponderance of the credible evidence that Respondent has violated the Act.

7. All full-time and regular part-time production and maintenance employees employed by the Employer at its facility located at 2801 S. Beech Daly, Dearborn Heights, Michigan, but excluding salespersons, guards and supervisors as defined in Act, constitute a unit appropriate for the purposes of collective bargaining.

8. The Union is, and has been since November 24, 1976, the exclusive collective-bargaining representative of the employees in the above-described unit.

VI. The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist thereform and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discharged Stephen Stanley and Gregory Stone and laid off or terminated the 14 employees named above in section V, I recommend that Respondent be ordered to offer each of them full and immediate reinstatement, without prejudice to their seniority or other employee benefits and to make them whole for any loss of earnings and employee benefits they may have suffered from the date of the layoff or discharge to the date reinstatement is offered.[23] The amount of backpay shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 117 (1977).[24]

In view of the seriousness of Respondent's unfair labor practices, the recommended Order will provide that Respondent cease and desist from in any manner interfering with,

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[23] A number of the employees laid off on November 29 and 30 were subsequently returned to work. The extent to which the Respondent must still comply with the provisions of the Order shall be left to the compliance stage.

[24] See generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

restraining or coercing employees in the exercise of rights guaranteed to them in Section 7 of the Act.[25]

It is further recommended that Respondent be ordered to recognize and bargain with the Union as the exclusive bargaining representative of the employees in the above-described bargaining unit.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10 (c) of the Act, I hereby issue the following recommended:[26]

ORDER

Respondent, Machine Tool and Gear, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning their union activities or the union activities of other employees.

(b) Threatening to close its plant if its employees select International Union, United Automobile, Aerospace and Agricultural Implement Workers, UAW, or any other labor organization to represent them.

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[25] *N.L.R.B.* v *Entwistle Mfg. Co.*, 120 F. 2d 532, 536 (C.A. 4, 1941).

[26] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) Threatening to discharge or to reinstate employees in order to discourage union activities or support for the above-named Union or any other labor organization.

(d) Granting employees Christmas bonuses or other benefits in any attempt to undermine the above-named Union or any other labor organization.

(e) Discharging, laying off, or otherwise discriminating against employees to discourage union activities or support for the above-named Union or any other labor organization.

(f) In any other manner, interfering with, restraining or coercing employees in the exercise of their rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer the following named employees immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for their loss of earnings in the manner set forth in the section of this Decision entitled "The Remedy":

Gregory Stone	Stephen C. Stanley
Nabil Ajami	Daniel Jaime
Ibrahim Aboul-Hassan	Peter Jaime
Ali Dakroub	Betty Khalaf
Mustfa Fawaz	Dennis Ladanyi
Mohamad Harajly	Kenneth LeBlanc
Robert Harris	Ronald Thornton
Kirk Hulett	Khalil Zaban

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, reports and all other records necessary to analyze the

amounts of backpay due under the terms of this recommended Order.

(c) Recognize and, upon request, bargain collectively with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, as the exclusive representative of the employees found herein to constitute an appropriate unit, with respect to wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such agreement in a signed contract.

(d) Post at its plant in Dearborn Heights, Michigan, copies of the attached notice marked "Appendix."[27] Copies of said notice, on forms provided by the Regional Director for Region 14, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 14, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.

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[27] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

IT IS FURTHER ORDERED that those allegations in the complaint as to which no violation have been found are hereby dismissed.

Dated, Washington, D.C. February 27 1978.

/s/ Bernard Ness
Bernard Ness
Administrative Law Judge

APPENDIX D

TRANSCRIPT OF TESTIMONY

[33] GREGORY STONE

A witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Judge Ness: I notice that Mr. Stone's name is not listed on General Counsel's exhibit four. I don't know if he was an employe then at that time. I am just asking about it. Do you have any intention—?

Mr. Lewis: It is our contention he should be in the unit, Your Honor. I thought I had counted off all the names of the people that we wanted to show as being in the unit, and I apparently missed Mr. Stone.

Judge Ness: And you say he is a supervisor?

Miss Edwards: That is correct, Your Honor.

* * *

Q. And have you been employed by Machine Tool and Gear, Inc.? A. Yes.

Q. When did you first become employed by that company? A. That was in February of 73.

Q. And when did you last perform work for them? A. That was in early December of 76.

Q. And would you tell us, as of November 24th, 1976, what [34] was your job? A. I maintained machinery and make sure the parts were to print.

Q. Now, what shift were you working on at that time? A. That was afternoons.

Q. And about how many people as nearly as you now recall were working afternoons at that time on that shift? A. I believe there was about eleven.

Q. Would you tell me in particular, did you at that time run production on any particular machine? A. No. Only if it was needed. If they needed something extra I would run machinery.

Q. Could you tell me again, as of that month of November, 1976, with what machine there at Machine Tool and Gear had you had experience operating? A. I ran about, just about everything in the shop at one time or another but the screw machines was my main responsibility.

Q. Would you tell us the names of the other machines that you had operated? A. I had operated I.D., O.D. grinder, tracer lathes. Some gear shapers. Centerless grinders.

Q. Now, what were your responsibilities, if you can go into this a little further, your responsibility as of late November, 1976 in regards to the afternoon shift? [35] A. I made sure the machines were running and the parts were to print. And I locked up at night.

Q. Did you have occasion at that time to tell employes, any employes, on your shift to do particular kinds of work? A. At the beginning of the shift I was told by Al and Jim Keener what was needed to be done And then the people would move around to what needed to be done.

Q. Who was Jim Keener? A. Jim Keener was my foreman.

Q. Did he work on or during any part of the afternoon shift himself? A. He was usually there til about 5:30, about two hours into the shift.

Q. Had he been there, if you know, during the day shift at the plant? A. Oh, yes.

Q. And you mentioned Al. Who is Al? A. Al Berry.

Q. What was his position there? A. He was the shop superintendent.

Q. And did he regularly stay into any part of your after shift? A. Yes he did.

[36] Q. How much of it? A. About the same, 5, 5:30. About the same as Jim Keener.

Q. Was that on a daily basis? A. Yes.

Q. And did you ever work day times? That is, the day shift? A. Yeah, I worked day shift about the first two years I was there. Then I was off and on the night shift, night and days.

Q. Now, were you working off and on on the day shift as of November, 1976? A. Yes.

Q. What would occasion your working on the day shift? A. Any time Jim Keener did show up for the day shift, they would usually call me in.

Q. How often would that happen? I refer to the last half of the year 1976, this month of November and months immediately preceding? A. Well, any time Jim Keener would miss, maybe for a few weeks out of the year.

Q. A few weeks at a time or scattered through the year? A. It would be two or three days at a time, and then his vacation, I would work on days during his vacation?

Q. I see. Now, when you worked days, could you tell us just what your responsibilities were then in 1976, when you would be on days in connection with Mr. Keener's absence? [37] A. It was pretty much the same as what I did on afternoons, just make sure the parts were to print and keep the machines going the best I could.

Q. Would you on days have occasion to tell any employes to work on a particular machine, or at a particular job? A. Well, all of the people there pretty much got their own daily job they do. So they pretty much go to it without anybody saying anything.

Q. Was that bc.n the day shift when you were on it and the night shift? A. Yes, pretty much so.

Q. And during the times when you worked on the day shift, to whom were you responsible? A. To Jim Keener and Al Berry.

Q. If Mr. Keener was absent? A. It would be Al Berry or Tim LeBlanc.

Q. Can you tell us what instructions or directions they would give you when you were on the day shift? A. It was pretty much routine what the day shift did every day. They did not get involved unless they needed somebody to work in the back or something.

Q. Well, how would they get involved if that happened? A. Well, they would just come up and tell me what they needed and who they wanted.

Q. And would you then relay that to the employe? [38] A. Well, he would pretty much go the employes himself if he needed them to work somewhere.

Q. Now, how long had you had this position on the evening shift that you have been describing, on the afternoon shift? A. Well, that was off and on for the past two years.

Q. And was there any occasion when anybody in the company management or supervision told you what authority you had, if any, on the afternoon shift, or the day shift? A. Only time, like if I wanted something, like if I wanted to get on days or something. They'd tell me no, they needed a good foreman on nights to take care of things.

Q. Well, did you ever ask to go on days? A. Several times.

Q. All right, who did you ask in particular? A. Usually I would go to Al when I wanted something.

Q. All right, what was the most recent time that you had done that, prior to your lay off of December? A. I can't give you an exact date. It was in the winter months, because I was supposed to bowl on a bowling team.

Q. Well, did you mean early in the year 1976? A. Yes.

Q. I see. And can you recall his response in particular? A. Well, he let me have Fridays off to bowl. And then I stayed on afternoons.

[39] Q. Did you ever have anyone hired? A. Did I hire anybody?

Q. No. My question was, did you ever have anyone hired A. Yes. I have asked Al to hire friends of mine, something like that, yes.

Q. All right, how many times has that happened? A. I can't give you an exact—seven, eight times, probably.

Q. Did he take your advice on all occasions—advice or request or whatever it was? A. Maybe not right away. But if an opening came along, he would generally go ahead and hire somebody I knew if I asked him to.

Q. Can you recall the names of any specific individuals that you had recommended? A. Danny Jaime was one. But I went to Jim Keener and asked Jim Keener.

Q. Any other names? A. I can't think of anyone else right now.

Q. And have you ever recommended that anyone be let go? A. One time I did.

Q. All right, what was the name of that individual? A. That was Al Garcia.

Q. And can you tell us when that was? A. Year and half, two years back.

Q. And what was the occasion? What had caused the problem? [40] A. He came in high on something. I don't know if it was booze or dope or what.

Q. All right, and you reported that? Did you report that? A. Yes I did.

Q. And to whom was that? A. That was to Al Berry.

Q. All right, what happened as result of your mentioning that? A. He pulled Al aside; talked to him; called me over

there. Said that he is going to straighten his act out. To go ahead and let him have another try.

Q. Was Garcia in fact kept on? A. Yes he was.

Judge Ness: What shift were you on at the time of the incident?

The Witness: Afternoons.

Q. (By Mr. Lewis) Was Garcia on your shift at that time? A. Yes he was.

Q. Were you ever told that you were responsible for reporting latenesses or absences of employes? A. I did not really have to report anything like that because like they were there for an hour and a half, maybe two hours into my shift, so they knew who was late. I never reported it.

Q. Who are you referring to as they? [41] A. Al Berry. Jim Keener. Tim or Tommy LeBlanc.

Q. They never told you anything about whether you should report latenesses or absences? A. No, they never mentioned it.

Judge Ness: Did the employes punch time cards?

The Witness: Yes they did.

Q. (By Mr. Lewis) Did you assign overtime to employes? A. No, sir, I didn't.

Q. All right, could you go into the overtime situation a little further? Did they work overtime on the afternoon shift, and, again, I refer to the last half of the year 1976? A. There was occasion, yes.

Q. About how often would you say it was worked by someone or other on your shift? A. Well, the last six months it was pretty rare. We did not work too much overtime on that shift.

Q. How did employes find out they were going to work overtime? A. Well, it was according to what job these people were in. Whoever ran the job that needed to be ran would usually be asked to stay over.

Q. Now, who did they ask? A. Well, Jim would usually ask me to ask them, or he would ask them himself.

Q. That's Mr. Keener? [42] A. Right, Jim Keener.

Q. Did you ever get a raise for anybody on your shift? A. I might have went and asked Al, but usually I would just tell them to go ask—tell them to talk to the people themselves. Usually I would tell them to go ask Al Berry or Jim Keener about it themselves.

Q. Was there any occasion, any time that you can recall when you took anyone's request to either Al or Jim or anyone in management? A. No, I can't recall any times.

Q. Other than the occasion when Mr. Garcia presented a problem, did you ever talk to anyone in management about having an employe disciplined? A. No. No.

Mr. Lewis: This would be marked next, G12.

* * *

Q. (By Mr. Lewis) Mr. Stone, if you would look at that card, and now I ask you, whether that is your signature on the card? A. Yes it is.

Q. And I see a date, November 22nd, 1976, on there. Is that the date on which you signed it? A. Yes it is.

Q. I'd like to ask you where you got the blank for this [43] card? A. I got it from Steve Stanley.

Q. And he was a fellow employe of yours at the company? A. Yes he was.

Q. And what did you do with your card when you had signed it? A. I kept it.

Q. And how long did you have it? A. I believe it was a day or two after we filled it in.

Q. And then to whom did you return it? A. Fred Meloche.

* * *

Q. (By Mr. Lewis) Mr. Stone, did you have more than

just the one blank card that you yourself filled out? A. Yes I did.

Q. Can you estimate for us how many blanks you had in your possession? A. I had about a dozen.

Q. Did they all come from Mr. Stanley? [44] A. Yes, they did.

* * *

Q. (By Mr. Lewis) I show you what is marked General Counsel's 13, Mr. Stone, and ask if you would look at that, then my question is, whether you recognize that card? A. Yes I do.

Q. All right, how do you recognize it? What was your previous contact with it, is really my question? A. Well, we all filled them out at the same time in the office.

Q. All right. Was that the same date that you filled out your own? A. This is the same.

Q. I see the date, 11, 22nd, that's the date that it was filled out? A. Yes.

Q. And what was done with it after the individual filled it out? A. I kept it until I handed them in a day or two later.

Q. Did he give it directly to you? A. He gave them directly to me.

Judge Ness: Are you going to the next card?

Mr. Lewis: Yes.

[45] Judge Ness: Before you go to the next card, what name is on 13?

The Witness: It's Mustfa Fawaz.

Judge Ness: F-a-w-a-z. And was the card given to you on the 22nd?

The Witness: Yes, it was.

Judge Ness: By the individual whose name is on it?

The Witness: Yes.

Q. (By Mr. Lewis) And I show you what is marked GC14, and if you would look at that. For the record, would you read

the name that appears on the top of the card? A. Robert Harris.

Q. Have you had previous contact with that card? A. Yes.

Q. All right, what was your contact with it? A. He filled that one out the same time I filled it out.

Q. And was this on the date I see written on it, 11/22/76? A. Yes.

Q. And what did Mr. Harris do with it when he had filled it out? A. He gave it back to me.

Q. I show you the document marked G15, and does the name of Mohamad Harajly appear on it? A. Yes.

Q. And I will ask whether you have seen that card before? [46] And what was your previous contact with it? A. Well, this particular card was filled out in another room. But it was gave back to me.

Q. All right, how did the individual get the card? A. Elizabeth Khalaf, I think that's how you pronounce it, gave him this one.

Q. And how had she gotten it, if you know? A. From me.

Q. And to whom did Mr. Harajly return it? A. To me.

Judge Ness: This was also on the 22nd?

The Witness: Yes.

Q. (By Mr. Lewis) I show you what is marked GC16, and I see the name on it, Ibrahim Hassan, and I would ask you to look at that card. And then I'll ask you if you have seen that card before? A. Yes.

Q. All right, what was your acquaintance with it? A. That was filled out in the same room that Mohamad—.

Q. Do you know where Ibrahim Hassan got that card? A. That was from Betty—Elizabeth.

Q. And where had she gotten the blank? A. From me.

Q. And did you see the card after he had filled it out? A. Yes, and he handed it back to me.

[47] Judge Ness: Wait a minute. By the nature of your question, you are assuming he filled it out personally? Did you see him fill it out?

The Witness: No, I did not see him—.

Judge Ness: All you are testifying is that after it was filled out, he handed it to you?

The Witness: Right.

Mr. Lewis: This individual is one of those whose signature I am offering the W4s for.

Judge Ness: All right, I understand the witness' testimony.

Q. (By Mr. Lewis) I show you what is marked G17. Would you read the name on that card please? A. Kirk D. Hulett.

Q. And I am not sure just whether I got into the questioning on this card, so let me ask — I'll repeat, did you provide that card, the blank, to Mr. Hulett? A. Yes I did.

Q. What did he do with it if you know? A. He filled this one out right there in the office in front of me.

Q. And what did he do with it when he finished? A. He give it back to me.

Q. And was that on the date that I see on the card, November 22nd? [48] A. Yes it was.

Q. I show you what's marked GC18 and would you read the name off it for the record? A. Elizabeth Khalaf.

Q. Have you seen that card before? A. Yes.

Q. Where did Mrs. Khalaf get it, if you know? A. From me.

Q. And did you see that card completed, filled out by her? A. No. She filled it out with the other two.

Q. That you have already mentioned? A. Right.

Q. And did you see the card after it had been filled out? A. Yes, she gave it back to me.

Q. And did you receive it on the date I see there, 11/22/76? A. Yes.

Q. I show you what is marked GC19, and ask if you would read the name for the record? A. Dennis Keith Ladanyi.

Q. Have you seen that card before? A. Yes.

Q. All right, what had you observed of it before? A. He filled this one out in front of me.

Q. Did you provide the blank card for it? [49] A. Yes I did.

Q. And what did Ladanyi do when he had filled it out? A. He gave it back to me.

Q. And was this on November 22nd, 1976? A. Yes it was.

Q. I show you what is marked GC20, and ask if you would tell us the name that is on that one? A. Ronald K. Thornton.

Q. And have you seen that card before? A. Yes.

Q. Would you tell us what you have seen of it? A. He filled this one out in front of me, too.

Q. Now, I see the date on there, November 24th, would that have been a different occasion? A. Yes it was.

Q. What did he do with the card when he had filled it out? A. He give it back to me.

Judge Ness: Now, whose name was on there?

The Witness: Ronald Thornton.

Mr. Lewis: At this point your honor we would offer into evidence, General Counsel's proposed exhibits 13 through 20.

Judge Ness: Any objection?

Miss Edwards: I have some cross examination.

* * *

[50] Judge Ness: With respect to their authenticity?

Miss Edwards: Yes.

Judge Ness: Just on their authenticity I'll permit voir dire.

Miss Edwards: With reference to proposed exhibit GC13,

do you know who filled in the name of Mustfa Fawaz on the first line?

The Witness: He did.

Miss Edwards: He printed that? And who filled in the addresses and classification?

The Witness: He did.

Miss Edwards: You saw him do this?

The Witness: Yes.

Miss Edwards: And where were you and where was he when you saw him?

The Witness: He was in the lunchroom having lunch.

Miss Edwards: In the lunchroom having lunch. Now, GC14, who filled in the address, the name at the top, the printed name, the classification and so on?

The Witness: He did.

Miss Edwards: You saw him?

The Witness: Yes.

Miss Edwards: Where were you?

The Witness: I was in the lunchroom having lunch.

Miss Edwards: I thought you said these were filled out in [51] the office?

The Witness: In the office. It was the office where we had lunch.

Miss Edwards: You were having lunch in the office?

The Witness: Right.

Miss Edwards: Do you regularly eat lunch in the office?

The Witness: Right.

Miss Edwards: What office was this?

The Witness: This was Al Berry's office.

Miss Edwards: The superintendent's office?

The Witness: Right.

Miss Edwards: Now, the same question with reference to GC15, who filled out the name of the—?

The Witness: I wasn't there. I didn't see that one.

Miss Edwards: You don't know?

The Witness: No, I did not see that one filled out.

Miss Edwards: All right, now with GC16, Ibrahim Aboul-Hassan, who—?

The Witness: I did not see that one either.

Miss Edwards: Do you have any reason to believe that the same person filled out the machine operator and so on as filled out the rest of the information? Doesn't that look like a different writing altogether?

The witness: Yes.

Miss Edwards: It does?

The Witness: Yes, it does.

[52] Miss Edwards: And you do not know whether Ibrahim signed that either or not, do you?

The Witness: I did not see it.

Miss Edwards: Now, with Kirk Hulett, did you see him fill that out?

The Witness: Yes, I did.

Miss Edwards: All of it?

The Witness: Yes.

Miss Edwards: And with Elizabeth Khalaf?

The Witness: No, I did not.

Miss Edwards: You did not see her fill it out? So you do not know whether anything other than the signature is hers?

The Witness: I did not see her sign it. I did not see her fill it out.

Miss Edwards: And Dennis Ladanyi?

The Witness: I saw him fill it out.

Miss Edwards: And he put everything on there that's on it?

The Witness: Yes he did.

Miss Edwards: And Ronald Thornton?

The Witness: Yes he did.

Miss Edwards: I object to the admission of the ones he did not see filled out or signed.

Judge Ness: Specifically which? Well, the record will [53] show which. I'll receive General Counsel's 13 through 20.

* * *

Q. (By Mr. Lewis) When you had collected these cards that you had witnessed just now, what did you do with them? A. I kept them for a couple days. Then I turned them in to Mr. Meloche.

Q. Did you turn in any completed cards besides the ones that we have just had your testimony about here now? A. Yes.

Q. Where did you get those? A. From Steve.

Judge Ness: When you say turned in, who did you turn them in to?

The Witness: I handed them over to Mr. Meloche.

Judge Ness: These were from Steve Stanley?

The Witness: Some was from Steve. And the others were the ones that I passed out.

Q. (By Mr. Lewis) I believe you dated your lay off as the first part of December. My question is, between the time that you started giving out these cards that you have described, which I take it to be around November 22nd, and the day of your lay off, did you speak with any member of management, any person in the plant management about the union? [54] A. Yes.

Q. All right, who was it you spoke to? If it was more than once, you can tell us the first time? A. The first time I believe was with Al Berry over the phone. It was Buick. I called for some parts, and I had to call Al to find out what happened to the parts. And he mentioned that Tom LeBlanc had wanted to fire Stanley that day. But he had talked Tom LeBlanc out of it.

Q. Was that the extent, or what else was that at that time?

Judge Ness: I'm sorry. I didn't get the first part either.

The Witness: He mentioned that Tom LeBlanc had wanted to fire Steve Stanley for his union activities, union organizing activities. But he had talked him out of it.

Q. (By Mr. Lewis) Now, what date is this, as close as you can place it? How long after you began giving out those cards, which was apparently November 22nd, how close to the date of your discharge would you place the time? A. It was within a day or so.

Q. Of which? A day after the cards were first passed out? A. Yes, around a day or so after.

Q. What time of day, if you recall, was this phone conversation? A. The phone conversation was during the night shift.

Q. Can you remember whether it was before lunch break or after lunch break during the afternoon shift? A. I would put it before lunch.

[55] Q. What time, by the way, if there was a time for lunch break, what time was it? A. 8:30 was lunch period.

Judge Ness: You called him at home?

The Witness: Yes.

Judge Ness: I am sure that you have noticed by now that from time to time I may ask some questions. If anyone wants to object to any questions I may ask, they may do so.

Mr. Lewis: I am usually too busy trying to think of my next question to object.

Q. (By Mr. Lewis) Did you have any other conversation, again, within the same time period, between the time that you began collecting cards and the date of your lay off, did you have any other conversation with any one or ones in management there in regard to either your work or in regard to your activities, organizing? A. I was talking to Jim Keener by the scale one day, trying to see if he would be interested in filling out a card and we was talking about it and then Al came

up to the scale and he was talking about it. Jim mentioned that he did not think the shop could survive with a union. But Al come over; he said he was positive that the shop would close down with a union in.

Q. Was there anything else said in that conversation? Please try to recall the whole conversation. [56] A. The whole conversation? Well, first it was just me and Jim talking. I was trying to get him to fill out a card. Or I asked him if he would be interested in filling out a card.

Q. Did you have a card there? A. Yes, I gave him a blank card. He said he would think about it. But he said he really didn't think the shop would be able to survive with the union. And Al walked up and he was saying—but first I think he mentioned something about get to work and stop wasting time and then he said something like the shop would not be able to survive with the union. I just told him to go talk that stuff to the Arabs. I don't want to hear it.

Q. What time of day was this? A. This was, oh, afternoon.

Q. This was the afternoon shift? A. It was not the afternoon shift—well, maybe right at the beginning of the afternoon shift.

Q. All right, do you recall whether you were working on the day or afternoon shift on that particular day? A. I believe I was on afternoons.

Q. All right, now I take it you started that conversation about the card? A. Yes.

Q. Was there any occasion during this—?

Judge Ness: Are we going on to something else or are we [57] still on the same conversation?

Mr. Lewis: We are going on to something else, Your Honor.

Judge Ness: Maybe I missed the time frame here.

Mr. Lewis: I should perhaps question further on that.

Q. (By Mr. Lewis) Was this conversation before or after the other conversation which you had described, the phone conversation? A. I believe that was before.

Judge Ness: Which one?

The Witness: The conversation at the scale, I believe that was before the phone conversation.

Judge Ness: Before you handed out any cards?

The Witness: It was after I handed out cards.

Judge Ness: So it was after the 22nd?

The Witness: Yes.

Judge Ness: Any idea how much later?

The Witness: I can't give an exact date.

Judge Ness: I think you testified that the telephone conversation was the day after you handed out the cards?

The Witness: Yeah, within a day or two after that.

Q. (By Mr. Lewis) My next question is whether there was any occasion thereafter, again within that period of time leading up to the date of your lay off, when you had conversations with either Mr. Berry or anyone else in [58] management? A. There was one other time when Tim and Al asked me into the office. But Timmy did all the talking.

Judge Ness: Be more specific. Who is Tim and who is Al?

The Witness: Tim LeBlanc and Al Berry.

Q. (By Mr. Lewis) And how did you get the word they wanted to talk to you? A. Tim asked me to come into the office.

Q. And can you remember what date this was? Was it after both those conversations that you have just described? A. Yes.

Q. Can you place it any more closely? A. No, I can't pinpoint the exact day.

Q. All right, what time of day was it, as best you recall? A. That was before lunch I believe.

Q. Tell us, which shift were you working? A. I worked days. On this particular occasion I was working days.

Q. All right. What time by the way was lunch break on the day shift? A. Noon, 12 noon.

Q. And would you tell us then just exactly what happened? A. He asked me how I felt—.

Judge Ness: Who, they were both there.

The Witness: Excuse me. Tim LeBlanc asked me how I felt [59] about this union talk that Steve had been talking about. And I told him that I was with Steve a hundred per cent. Then he asked me what I thought a union would give me that I did not already have. I said a better medical plan. Better wages, paid vacation. And he asked me, why don't I get a job with a union company. I did not answer the question itself by saying, oh, they are not hiring. And then they thanked me for my honesty and that was about it.

Q. (By Mr. Lewis) Did Mr. Berry have anything to say during this conversation? A. He did not say a word.

Q. Was he present throughout the conversation? A. Yes he was.

Q. Did you have any further conversation with either of those individuals on the same date? A. On the same date? I believe it was the same day that they told me they were going to lay off the afternoon shift.

Q. What were the circumstances of that conversation? Were you called to them, or what happened? A. Tim asked me to come into his office.

Q. All right, and was it Tim's office that you were in when you spoke to them? A. Yes it was.

Q. Was Mr. LeBlanc the only person there? A. I believe Al was with him.

[60] Q. That's Mr. Berry? A. Yeah, Al Berry. Excuse me.

Q. And would you try to recall just what was said by both in that conversation? A. Well, I was just told they were going to lay off because of a shortage of work.

Q. Now, who was doing the talking? A. That was Tim.

Q. Did you question him at all about the shortage of work he spoke of? A. No I didn't.

Q. And who was it that he was saying was being laid off? A. The entire afternoon shift. He said he was going to bring me on days.

Q. Was this the extent of the conversation as far as you can recall? A. Yes.

Judge Ness: Now, this was the same day as the conversation that you had with—?

The Witness: To the best of my memory, yes.

Judge Ness: Was that the same day as the lay off?

The Witness: Yes.

Q. (By Mr. Lewis) Was there any indication of a shortage of work for either the night shift or the plant as a whole? A. Well, we were up on parts because of the strike, Ford strike.

[61] Q. What do you mean by up on parts? A. Up on production. We had 30,400,000 parts on the floor.

Q. And was there anything said by management other than this conversation that you have spoken of as to whether there was a shortage of parts, a surplus I guess I should characterize it, Your Honor. A. Well, a few weeks before that Jim and Al had talked about not laying anybody off because usually we stay behind on that job. So they was just going to use the parts as they needed them and try to get away without working half days on Saturday like we normally do.

Q. How long before this lay off of the evening shift was that conversation? A. Well, we talked about it a few times about three or four weeks before the layoffs occurred.

Q. Were the two gentlemen you mentioned together when you discussed it with them or were these occasions when you were with them separately? A. Well, I had talked to Jim Keener mainly and he had thought this is the way he would go about it.

Q. Was work thereafter to your observation cut out on Saturdays?

Judge Ness: After the lay off?

Mr. Lewis: No, Your Honor, I mean after those [62] conversations of several weeks earlier, did they eliminate Saturday work, if you recall?

The Witness: I don't recall.

Judge Ness: When you say you don't recall, you don't know if it was kept up or not?

The Witness: Kept up?

Judge Ness: Saturday overtime?

The Witness: After the layoffs or before the layoffs?

Judge Ness: After this conversation?

The Witness: I don't believe they worked the full—. Discontinued or cut it down to a minimum.

Q. (By Mr. Lewis) And what were the circumstances of your own lay off? How did you find out about it? A. Tim asked me into his office?

Q. What time of day was that? A. That was in the later afternoon.

Q. And what shift were you working that day? A. Days.

Q. Can you tell me just what was said between you? A. He asked me into the office. He gave me an envelope with two checks in it. That week and the following week. And he told me he was laying me off for causing a disturbance with the people and that he was probably more sorry about it than I was. And then he walked me to the door. Took my key. And the card was already done. That was about it.

[63] Q. Did you do any talking at all in that conversation, ask him what he meant or make any kind of reply? A. No, I don't believe I did. I believe I just took the checks and I left.

Q. What were the two checks for? A. They were for that week, my regular check and then the next week. So I was all paid up. So I wouldn't have to come back for another check.

Q. Was there normally a lag of a week in the giving of the pay? A. Yes.

Judge Ness: Did you say you were laid off or fired?

The Witness: He said laid off.

Q. (By Mr. Lewis) There was nothing said between you as to whether or when you would be called back? A. No, there wasn't.

Q. Had you ever been laid off before while you were working at this company? A. No.

Judge Ness: The complaint alleges this happened on December 1st. Do you agree on that date Miss Edwards? I am talking now about—the complaint alleges he was terminated or laid off, whatever it was, on December 1. Do you agree that this incident occurred on December 1?

[64] Miss Edwards: December 2nd, my expert says.

Judge Ness: Do you remember what day of the week this occurred?

The Witness: It was Thursday, I believe.

Mr. Lewis: Your Honor could take administrative notice that Thursday was—.

Judge Ness: The Thursday was?

Mr. Lewis: The second.

Judge Ness: You both agree that it was the 2nd?

Mr. Lewis: As far as we know it was, Your Honor.

Q. (By Mr. Lewis) What did you observe, if anything, of the lay off of the night shift? Did you know which was the last night when it happened? A. I don't understand.

Q. Well, were you actually there to observe that the night shift was no longer working at the end of November? A. Well, they had called the people over the phone during the days. I was working days when they called these people up.

Q. Were you around right there where the phone calls were made, or how do you know about them? A. Well, they told me that they was going to call the people.

Q. And who was that that said that? A. It was Al Berry and Tim LeBlanc said they would take [65] care of it.

Q. Do you know whether the night shift worked that particular night following their statement to you? A. No, they did not work that night.

Q. Do you know whether any of the employes were called back? That is, those who had been laid off as part of the night shift? A. There was two.

Q. All right, what do you know about their being called back? A. The day I got laid off they got called back.

Q. Did you actually see them working? A. Yes.

Q. And do you know who they were. Do you know them by name? A. I do not know them by name. They were Arabic. I don't really know them. They were there a short time.

Q. Was anything said by any management as to why they were back? A. No.

Q. You said they were over there only a short time. Do you mean other employes had more seniority then they? A. Oh, yes.

* * *

[67] Q. During the time that you worked for Machine Tool and Gear, did you ever receive a cash bonus? A. No, I did not.

Q. Had you ever received any kind of present from the company? A. Well, the first Christmas I worked there they gave us a ham. At Thanksgiving they gave us a turkey.

[68] Q. By us did you mean a number of employes? A. Every employe received a turkey and a ham the first year. The second year we only got the turkey at Thanksgiving.

Q. Those were the only occasions that you received anything in the nature of a gift from the company? A. Yes.

Judge Ness: You say you received it. Does that mean that other employes received it?

The Witness: Yes.

* * *

[69] *Cross Examination*

Q. (By Miss Edwards) Witness, you said something about turning in shop keys? A. Shop key.

Q. Is that your key to the front or back door of the shop, to admit you to the building? A. I believe the one key worked for both locks, I believe.

Q. Did any other employes on the afternoon shift have such a key? A. Not to my knowledge, no.

Q. Do you know who did have such a key? A. No, not everybody. No.

Q. Did anybody other than supervision that you know of have a key? A. On occasions they had keys.

Q. On occasions? A. Right.

Q. Can you indicate the nature of such an occasion? A. If I was to go home early or if I wasn't there, they would give somebody else the key to lock up.

Q. And they gave it back to you the next day? A. Well, I'm saying that if I wasn't there, they would just give him a key.

Q. Who would give them a key to lock up? [70] A. I don't know if it was Tim or Al or who it was. Usually it was Al Berry.

Q. And who would that key be given to? A. On the afternoons usually Kirk Hulett.

Q. Kirk Hulett. And he substituted as foreman on the afternoon shift for you when you worked days for Jim Keener, is that right? A. He would lock up. He wasn't a foreman.

Judge Ness: He would lock up what?

The Witness: He would lock up at night. That was the extent of his responsibility.

Q. (By Miss Edwards) He didn't answer the telephone, for example? A. I imagine he would do that.

Q. If somebody got sick or had an injury, would he take over? A. Take over, what do you mean?

Q. If somebody cut their arm off, would he call an ambulance, send them to a clinic, notify top supervision or whatever? A. He would probably just send them to the hospital.

Q. But Kirk Hulett would do that? A. Yeah, he would.

Q. But he would be the person the whole afternoon shift? A. Yeah, I would imagine so.

[71] Judge Ness: This is when you were absent?

The Witness: Yes.

Judge Ness: There's been talk about foremen here. What title did you have?

The Witness: I didn't have a title.

Q. (By Miss Edwards) As a matter of fact, you were the foreman, weren't you? A. No, I don't believe I was.

Q. Were you paid more than any other worker on that shift? A. Yes.

Q. Was there anybody who gave you any orders on that shift after "Jim" Berry and Jim Keener went home from the day shift? A. No.

Q. And on the other hand, isn't it true that you switched employes around on the afternoon shift if you needed to? A. If I was told what was needed to be done, then the people would move around to the machines that needed to be ran in order to get what I was told to get done.

Q. And you would tell them when to move? A. Right.

Judge Ness: Let me see if I understand what you mean. Did you select the employes to work on particular machines that had to be run?

The Witness: There was usually what the individual [72] person knew what to run. Normally they had a machine they ran pretty much every day. But some of them knew one to two or three different machines. And then I would move them around according to what they knew. But very seldom would I change somebody.

Judge Ness: And this is based upon what Mr. Berry or—?

The Witness: Or Jim Keener told me.

Judge Ness: And Jim Keener told you what machines had to run on the afternoons?

The Witness: Right.

Q. (By Miss Edwards) Wouldn't it be a little different, wouldn't they tell you what parts they needed for each shipment? A. Yes.

Q. And then you knew what machines had to be run in order to produce those parts? A. Right.

Q. And you knew which people were capable of running those machines? A. Yes.

Q. And you were the person who decided whether it would be more important to leave employee "b" running a lathe, or shift him to another machine? A. Yeah, pretty much, most of the time.

Q. Now, isn't it true that when you took that job or were transferred to the afternoon shift, that Al Berry talked to [73] the employes and told them that you would have the power to discipline them and they should take their orders from you? A. No. He told them to see me if they had any problems.

Q. That is not what you said in the affidavit, is it? A. He never told me that I had the power to discipline people.

Q. Isn't it true that he told the other employes on the afternoon shift that you had the power to discipline? A. Not to my knowledge.

Miss Edwards: May I see the affidavit, please?

Q. (By Miss Edwards) Mr. Stone, do you remember signing this affidavit? A. Yes I do.

Q. You can look at it. That is your signature on that page? A. Yes it is.

Q. Now, do you recall this statement—?

Mr. Lewis: What page is she referring to, Your Honor?

Miss Edwards: Page three. Right in the middle.

Q. (By Miss Edwards) When I was first put on the night shift, Al Berry talked to the employes and they understood that I had the authority to discipline. I was a softie and when I had a problem with someone, I would tell Berry or Tim or Tom LeBlanc, general manager and foreman. They would then [74] talk to the employe about—do you remember that statement? A. I don't remember the exact statement.

Judge Ness: If you are quoting from the affidavit, show him, rather than—show him that portion and ask him if that is correct, what he wrote.

Q. (By Miss Edwards) Now, is that statement true? A. Yes.

Judge Ness: Can we have a time frame on this. When were you first put on afternoons?

The Witness: I don't remember the first time I was put on nights. I was off and on for a couple of years.

Judge Ness: Well, I am talking now about—he spoke to the employes?

The Witness: Yes. He told the employes that if they had a problem.

Judge Ness: I am asking you, about when was this?

The Witness: I could not put a time on it.

Judge Ness: What year? You started in 73?

The Witness: Yes I did. Well, probably in 75.

Q. (By Miss Edwards) I think you testified that you had never been disciplined while you were with the company?

Mr. Lewis: I don't recall—.

The Witness: No, I—.

Q. (By Miss Edwards) Oh, you didn't testify to that. Were [75] you ever disciplined? A. Yes I was. I was fired for one day, one or two days. They called me back in one or two days.

Q. What was the reason for that? A. We had a little squabble over me getting on days again. So at lunch time I didn't return back to the job.

Q. Isn't it true you came back under the influence of liquor? A. No, that is not true. I did not come back to the shop.

Judge Ness: How relevant is this? Does that have anything to do with his discharge?

Miss Edwards: I think his testimony was that he had not been disciplined.

Judge Ness: Pardon?

Miss Edwards: I believe his testimony was that he had not been disciplined.

Judge Ness: I don't think he testified to that.

Miss Edwards: I thought he did.

The Witness: No, I didn't.

Miss Edwards: All right.

Q. (By Miss Edwards) Do you recall an incident when a man by the name of Sammy Thompson came to the shop one night and pulled a knife on someone? A. Yes I do.

Q. What did you do about it? A. I just got in the middle.

[76] Q. What did you do with Sammy? A. I just told Al about the incident. He was not working there. He was not supposed to be at the shop at the time.

Q. He was a day shift man? A. Now, he was a night shift man, but he was missing that day and he came in—he had been drinking.

Q. Are you saying you didn't throw him out of the building? A. I asked him to leave. I didn't throw anybody out.

Q. Did you escort him out? A. Yes.

Q. Why did you do it, instead of somebody else? A. Because I was there.

Q. You were in charge? A. No, because I was there when he did it.

Q. Was there anybody else there who had the authority to intervene? A. I think anybody would have, if somebody pulled a knife on a girl.

Q. I am asking if there was anybody else there who was in authority? A. In authority?

Q. Yes. A. What authority do you have to have to get someone who pulled a knife on a girl?

Q. Will you answer my question? [77] A. Everybody there had the authority to do it. If they were there, I think most of the guys would have.

Q. You are saying you didn't do this because you were in charge of the plant? A. I didn't do it, no—

Q. You were just standing there? A. I happened to be there when he did it.

Q. (By Miss Edwards) Now, let's talk about these cards that were filled out again. You said they were filled out in the superintendent's office? A. In Al Berry's office.

Q. And this is regularly used as a lunchroom by all employes? A. Not all employes. But on the night shift most of us ate in there.

Q. Are there tables there or anything that you can spread a lunch out on? A. Al's desk.

Q. And you all ate lunch together. Did you shut the plant during the lunch hour? A. Right.

Q. Shut down all the machinery? A. All the machinery was shut off.

Q. And everybody was in the room at the same time? A. Everybody in the shop?

Judge Ness: Are you talking about a particular time?

[78] Miss Edwards: During the lunch hour on the afternoon shift.

The Witness: Not the whole shift.

Q. (By Miss Edwards) That's what I want to know. A. Oh! Okay, not the whole shift.

Q. Because they were in some other part of the shop, or because they were still running the machinery, which? A. They were in another part of the shop usually eating.

Q. I see. So who was present when these cards were filled out on the 22nd? A. Kirk Hulett was there. Robert Harris was there. Dennis Ladanyi was there.

Judge Ness: In the same room with you?

The Witness: Yes. Mustfa Fawaz was there. That's all I recollect at this time.

Q. (By Miss Edwards) Is that when you distributed the cards? A. At lunch time, yes.

Q. And what did you say about them? A. Well, I just said that we needed a majority of these cards of all the people working at the shop in order to get the union interested in representing us.

Q. Now, isn't it true that working in the shop at that time there were six or eight Arabs, perhaps who did not speak English? A. On the afternoon shift?

[79] Q. Yes? A. I don't believe there was that many.

Q. How many? A. I believe there was about three.

Q. Who were the three people on the afternoon shift who did not speak English? A. There was three or four. Two of them I don't even know their names. They were the first two called back to work. And then there was Ibrahim and Mo-

hamad. Ibrahim Hassan I believe was his last name. And Mohamad Harajly. He spoke a little broken English.

Q. Now, I will hand you General Counsel's exhibit four and see if that will refresh your memory as to names of people who were employed in the shop at that time who—on the afternoon shift who did not speak English?

* * *

[80] The Witness: I would say there was about three or four who couldn't understand it at all. But there was Mustfa who understood it pretty good. And Mohamad spoke a little broken English and understood a little bit. And there was the other two fellows that I don't recollect their names.

Judge Ness: What about Mohamad?

The Witness: He spoke a little broken English, but he wasn't too good. There would be about four.

Q. (By Miss Edwards) All right, please go down the list and see if you can recall the names of the other two people? A. Ibrahim Hassan and Mohamad Harajly.

Q. How about Ali Dakroub? A. I don't know if he was the one. I didn't even know their names. They weren't there long enough for me to get to know them.

Q. Nabil Ajami? A. I never knew their names. There was two more.

Q. Those were the two that were recalled? A. Then those would be the two. They did not understand English.

Q. They were recalled on December 2nd, the day you left? A. Right.

Q. Now, were there some employes on the day shift you knew who did not understand or speak English? A. On the day shift?

[81] Q. Yes? A. Yes, there was a couple of people, but I didn't really know their name either.

Q. Well, do you want to look at the list and see if that helps you? A. Aziza Soueid did not understand English.

Khalil Zaban, he understood a little broken English, not much. And that's about the only two that I recognize their names and can put a face to it.

Q. But there might be others? A. Yes.

Q. Now, you stated that you had a conversation with Al Berry at one time when you—about some Buick parts. That this was perhaps a couple of weeks before you were terminated? A. I don't know if it was a couple of weeks. But, yeah, I had a phone call with him, a phone conversation.

Q. Well, now, if I told you that the company hadn't run Buick parts for some eleven months before then? A. It was Buick or Oldsmobile, because I confused the two at that time, too.

Q. So it may not have been Buick parts? Now, when you started to work, was there an afternoon shift? A. Yes there was.

Q. And how many people were on it at that time? A. I don't recall. That was four years back. Close to four years.

[82] Q. Well, were there as many then as there were when you left in 1976? A. There probably was.

Q. And isn't it true that the size of the shop increased during the time you were there generally? A. It increased and decreased. It had its high points. There were times when there were as many as fifty some people working there.

Q. And November and December of 1976 there were how many? A. Forty I believe.

Q. And you know, of course, what the business of the shop depends on? Will you tell the Court? What do you produce? A. Parts for the big three. The big companies.

Q. By big three you mean the three automobile manufacturers? A. Right.

Q. And the amount of business depends on what orders you got from those companies? A. Right. We did some government work. Very little.

Q. And there had been periods of time when there had been previous lay offs, have there not? A. Yes there has.

Q. Do you recall a lay off in December of 1974? A. Yes.

Q. When approximately a dozen people were laid off? A. Yes.

[83] Judge Ness: Are you asking him whether about a dozen people were laid off at that time?

Miss Edwards: Yes.

The Witness: I am not sure how many people were laid off. I remember there was a lay off.

Q. (By Miss Edwards) And again in February of 75? A. Yes.

Q. And again in March of 75? A. Yes.

Q. In June of 75 there was a substantial lay off. Do you recall that? A. No, I don't.

Judge Ness: You don't recall whether there was a lay off, or whether there was a substantial lay off?

The Witness: I don't remember if it was a substantial number of people.

Judge Ness: Do you remember a lay off at that time?

The Witness: Yes, a few people.

Q. (By Miss Edwards) Possibly eight or ten? A. Possibly.

Q. Now, do you recall another lay off in November of 1975, when perhaps fifteen or twenty people were laid off? A. Yes.

Judge Ness: Now, wait a minute. I want to be sure we know what we are talking about. You keep adding two factors [84] in your question. I want to make sure I know what the witness' answer pertains to. Do you remember a lay off in December of 75?

The Witness: Yes.

Judge Ness: Do you remember about how many people were laid off?

The Witness: No, I don't.

Judge Ness: If you are going to continue on this line, break it into two questions.

Miss Edwards: Okay.

Q. (By Miss Edwards) Do you remember a lay off in September of 1976? That would be about three months before you were terminated. A. No, I don't.

Q. You don't remember that one? A. No answer from the witness.

Q. Now, isn't it true that as of the time these layoffs were made, that the company customarily used the occasion to get rid of people that they felt were undesirable employes, I mean, because of absenteeism of their work attitude or one thing and another?

Judge Ness: If you know.

Q. (By Miss Edwards) Yeah, if you know? A. I know of cases like that. And I known of cases where good workers would go up and ask for time off, when they [85] would ask to be laid off.

Q. Yes. But I am asking you specifically, now, as to whether the company to your knowledge used these occasions to get rid of people they did not consider good employes? A. Yes and no. They get rid of some. But other people they would call back as soon as they had the work.

Judge Ness: With respect to the part of the answer that was yes, how do you know this?

The Witness: Well, Al would ask me, maybe like who was goofing off. Or who wasn't doing their work. He would ask me who was—.

Judge Ness: He would tell you there was a lay off pending, and show me the one?

The Witness: Yeah, he asked me, once or twice.

Q. (By Miss Edwards) And so you told him? A. I can't remember what I told him, to tell you the truth.

Q. But those were the employes that were laid off? A. Yes.

Q. And frequently not called back? A. Yes.

Q. Do you recall an employee who was there by the name of Richard Rose? A. Yes I do.

Q. Did you recommend that he be hired? A. Yes.

[86] Q. And was he hired? A. Yes.

Q. And was he subsequently terminated? A. I don't know if he quit or what. I don't know how that happened.

Q. Do you remember an employe by the name of James Dickert? A. Yes.

Q. Did you recommend that he be hired? A. Yes.

Q. Is he still there, or was he terminated? A. He quit. He had to go to school.

Judge Ness: I think the witness did testify that he recommended people, and they were hired as soon as there was an opening. Is this your testimony, if you recall?

The Witness: Yes.

Judge Ness: This may be repetitious. He has conceded that.

Q. (By Miss Edwards) This was on a number of occasions, is it not true? A. Yes. Sometimes it would take a little time until there was an opening. But usually they would hire people that other people in the plant knew and recommended.

Q. And specifically they hired people that you recommended A. Yes, they did. Several times for me.

Q. Was it your responsibility to make sure that you had a sufficient complement of workers to run the afternoon shift? [87] In other words, you had to have enough people there to run—to get the work out? A. Jim Keener made sure I had—who I had on the shift, Jim and Al usually.

Q. Isn't it true that if you found out there was going to be too many people absent, that you would ask employes to stay over from the day shift? A. Al would usually know about it.

Q. Did you ask him? A. I might have on occasion. But with their knowledge.

Q. But isn't it true that you asked the employes without asking Jim Keener? A. I can't recall any time I did it without asking Jim Keener or Al Berry. It's a rare thing if I did. A rare occasion.

Q. I direct your attention to your statement on page two of your affidavit.

Judge Ness: If you want him to read it out loud, why don't you have him read it out loud?

Q. (By Miss Edwards) All right, and ask you to read, starting with, "I have asked employes to stay?" A. "I have asked employes to stay over from the day shift, which ended at 3:30 p.m., if enough employes didn't show up on the night shift. Sometimes I would check with Keener first, but not always."

[88] Mr. Lewis: I think I would suggest the witness misread a word there, Your Honor. I think that we could agree that the text is, "if enough employes were absent on the night shift?"

The Witness: Yes, absent.

Q. (By Miss Edwards) Is that statement true? A. Yes.

Judge Ness: Are you saying there were occasions when you asked certain people to stay over from the day shift?

The Witness: Yes, but it was rare. But usually somebody did have knowledge when I was going to ask. It was almost always talked over with somebody.

Q. (By Miss Edwards) Now, when you worked on the day shift replacing Jim Keener, would you assign people there to their jobs? A. The people normally had their own machine and they would go right to it.

Q. But if you had to change somebody? A. Yes, if I had to change somebody.

Q. All right, and if somebody called in sick, would you authorize them or tell them that you had made a note of it,

and that it was all right? A. There was people that called in. But usually again they would usually talk to the lady in the office, Carol Doragazi.

Q. But if the call came to you you would excuse them? [89] A. Yes.

Q. Did you make recommendation as to who should be laid off on the day shift if the occasion arose and you were working the day shift? A. I don't recall me giving any advice to the day shift.

Q. Now, in laying off people on the night shift, you said that Al Berry would ask for your recommendations. Now, was seniority a factor in these layoffs? A. No.

Q. In other words, the company never had any seniority system, is that right, for any purpose? A. No.

Q. And after your termination, did you receive or take your vested interest out of the company pension plan? A. No. I was mailed a copy of something. But I never did anything with it.

Q. I see. And how long after December 2nd was that? A. That I received it?

Q. Yes. A. I am not sure of the date.

Q. Well, do you know approximately how many days? A. Probably within two weeks.

Judge Ness: I'd like to know the company's position. Is it a permanent termination?

Miss Edwards: Yes, its a permanent termination.

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[93] *Redirect Examination*

Q. (By Mr. Lewis) Mr. Stone, you said that you were paid more than others on the night shift. How were you paid, by the hour, by a salary, or what? A. By the hour.

Q. As of the end of November, 76, how much were you paid per hour? A. $4.85.

Q. Do you know who the next highest paid person was on your shift? A. No, I don't.

Q. So you wouldn't have any way of knowing what the next highest hourly rate was to yours? A. Only by the cards that usually averaged $3.25, $3.45 an hour.

Judge Ness: Did you maintain the machines, too?

The Witness: Just the light work. I really didn't know that much about maintaining.

[94] Q. (By Mr. Lewis) Did you know if anyone on—do you know if there was anyone on the day shift who got a rate as high as yours? A. On days. Oh, as high as me? No.

Q. Do you know whether there was? A. No, I don't.

Q. There might have been but you don't know? A. Yes. I don't know what people made.

* * *

[95] Q. When you yourself were originally hired, was that on the recommendation of some other employe? A. Yes it was.

Q. Who was that other person? A. Marty Jaime.

Q. And what job did he perform with the company at that time? A. He was a machine operator.

Q. Did they call him a foreman? A. No.

Q. Have there been instances in which you have recommended that employes be hired and they were not? [96] A. I cannot recall any. Usually it took a little time. But usually they would hire them.

Q. I believe you stated that you had chosen specific individuals from the day shift to stay over and work on the night shift. I believe that was in your affidavit somewhere. Can you tell me, how did you choose these individuals? A. I would choose them by whatever needed to be run, whoever knew how to run that machine, I would ask them. But usually somebody else knew who I was going to ask before I would ask them.

Judge Ness: How would they know? Because they knew who could run the machine that needed running?

The Witness: Yes. And usually if I thought that something needed to be ran, I would ask them and let them know about it before anything was done. That was the norm.

Judge Ness: There were times when you did this on your own?

The Witness: Yes, but rare.

Q. (By Mr. Lewis) How rare? How long had it been since you had done this at the time you were laid off? A. I can't remember a time when I just took it up on my own at this time right now.

Q. Were you ever given any instruction that you can recall by management as to whether or not you should check with them before you ask someone to stay over? [97] A. I cannot recollect any specific conversation. But that was normally what I would do. That's what I did normally, ask somebody else. Or let them know what needed to be done.

Q. Who were the other people if Jim was not there? A. It would be Al Berry. Or Tom LeBlanc. Or Jim LeBlanc.

Mr. Lewis: Thank you, Your Honor. Nothing further.

Miss Edwards: That's all.

Judge Ness: I believe you testified there were times when you worked the afternoon shift. Other times you worked the day shift. Generally did you just work the afternoon shift?

The Witness: The last two years it was mainly afternoons. It was just substitute for Jim when Jim Keener didn't show up.

Judge Ness: Okay. Apart from substituting for Jim, did you work the day shift?

The Witness: Any time there was a lay off, they would bring me on days.

Judge Ness: Would you explain what you mean there? Is is because the afternoon shift was down to practically nothing?

The Witness: Oh, well, usually if they laid off, it would come from the afternoon shift.

Judge Ness: Layoffs normally—you have mentioned a number of layoffs over a period of two or three years or so. Were those layoffs normally of the afternoon shift [98] employes?

The Witness: Yes. They would choose some of the better workers. They would bring on days also.

Judge Ness: Now, with respect to the cards that were received in evidence, several of them you say signed the cards in Berry's office in your presence, right?

The Witness: Right.

Judge Ness: When was it you gave those people the cards? That same lunch period or before?

The Witness: The same lunch period.

Judge Ness: When you gave them the cards, as best as you can recall, what did you say to them?

The Witness: I would say we need a majority of the people in the shop to fill them out in order to get the union interested in us. In order to someday maybe have an election. Or have an election and vote for a union. But first we had to get the union interested in us.

Judge Ness: Did you ask them to sign the cards, too?

The Witness: I asked them to fill them out, yes.

Judge Ness: And I believe you mentioned other employes in another part of the building that had handed you the cards after they were signed?

The Witness: Yes.

Judge Ness: You gave the employes those cards, too?

The Witness: I gave Elizabeth Khalaf I think three or four cards. And that was the only three I got back.

[99] Judge Ness: You gave him three cards?

The Witness: It was a woman, because she could speak a little Arabic and try to explain to them what the cards were all about.

Judge Ness: And then did each of those people give you back the cards?

The Witness: Yes.

Judge Ness: But you gave the cards to just one person?

The Witness: Yes.

Judge Ness: And what did you tell the person you gave the cards to?

The Witness: The same things I told the rest of the people, that you had to have the majority of the people interested before the union would take interest in you.

Judge Ness: Did you talk to other employes about supporting the union, other than the ones whom you gave cards to?

The Witness: Yes.

Judge Ness: What did you say to them?

The Witness: It normally was like people who was friends of mine; like, I would just talk about the union. I never really talked to them again about filling it out. We just talked about a union in the shop.

Judge Ness: Just in generalties?

The Witness: Yes.

Judge Ness: When was it that you heard that the UAW [100] was trying to organize. Cards were signed in your presence on the 22nd of November. When did you first become aware the UAW was trying to organize, and how?

The Witness: Do you mean before we got the cards?

Judge Ness: Yeah. You got the cards from whom?

The Witness: I got them from Steven Stanley.

Judge Ness: Now, is that the first you heard that the union was interested?

The Witness: Well, I had written down the phone number. And I had thought about calling him several times early, I had thought about calling him. And then one day we was talking and Steve decided to call him. And he called and he went and got the cards.

Judge Ness: About when was this with respect to November 22nd, how long before?

The Witness: I would say just a couple of days.

Judge Ness: Then when was it he gave you the cards, the same day, the 22nd?

The Witness: The same day.

Judge Ness: So your first activity on behalf of the union—correct me if I am wrong—was when Steve gave you the cards on the 22nd?

The Witness: Yes, that was my first.

Judge Ness: And then you handed out cards thereafter?

The Witness: Yes.

[101] Judge Ness: I believe you said there was one card signed the 22nd—24th?

The Witness: 24th, yes, he was part time.

Judge Ness: Did you give him a card, too?

The Witness: Yes, I did.

Judge Ness: On the 24th?

The Witness: Yes, I believe it was.

Judge Ness: And he gave it back?

The Witness: Yes.

Judge Ness: What did you say to him?

The Witness: Pretty much the same thing.

Judge Ness: Now, did you give out any other cards to the people?

The Witness: Yes, I gave some to—.

Judge Ness: I am not asking for the names. Other employes?

The Witness: Yes.

Judge Ness: About how many other cards did you give out?

The Witness: I give one person I would say about five or six.

Judge Ness: You gave one person five or six cards?

The Witness: Yes.

Judge Ness: When you spoke to these employes and you gave them cards, did you tell them how you felt about it?

[102] The Witness: Yes, I believe they pretty much knew that it was for a union.

Judge Ness: How did they know, because of the way you spoke?

The Witness: Well, they knew in the past year or two.

Judge Ness: I am talking about the ones you gave cards to. Did you voice your opinion as to what your opinion was to having a union in?

The Witness: Yes, I probably did. Yes.

Judge Ness: What did you tell them, as best you can recall?

The Witness: I probably told them it was the only way you could get better wages, and better medical.

Judge Ness: Now, the work that was performed on the afternoon shift, was that work similar to the work that was performed on days?

The Witness: Yes it was.

Judge Ness: Were there ever any occasions where problems arose where it was necessary to contact someone?

The Witness: Yes.

Judge Ness: Can you give us an example?

The Witness: Well, when the fellow called from the—it was Oldsmobile. And I called Al and asked him about the parts. Them type of situations.

* * *

[104] Judge Ness: So you went off the afternoon shift?

The Witness: No, I never did. When it came time, they got around it.

Judge Ness: But were there other times when they said they wanted you to remain on the night shift?

The Witness: Yes.

Judge Ness: And what were the reasons given?

The Witness: Well, it was just that, "you are a good man, Greg, baby," or something like that. Had too much to do.

Judge Ness: Were there occasions when while you were working nights or afternoons—I'll use that word interchangeably—where there occasions when employes wanted to leave early?

The Witness: Yes.

Judge Ness: Who did they go to for permission? Or did they just take off?

The Witness: They would ask me.

Judge Ness: Would you clear it with anyone else?

The Witness: Generally, no. If somebody asked me to go home, I would just tell them to go ahead.

Judge Ness: Why did you make the decision and not [105] somebody else?

The Witness: Well, when I got put on that shift Al Berry had told them if they have any problems to see me. And I pretty much knew the job, because I had been working there quite a few years.

Judge Ness: Were there any employes working on that afternoon shift that had been around quite awhile?

The Witness: Yes. There would be Kirk Hulett, who was around.

Judge Ness: Were there ever any occasions when employes on the afternoon shift were acting up, not conducting themselves properly, that you felt they should not stay there for the rest of the shift?

The Witness: The only time I remember asking anyone to leave like that was Al Garcia. And he was pretty well—I don't know if he was drunk or what he was, but he wasn't able to run the machine.

Judge Ness: Employes punch time cards, do they?

The Witness: Yes, they do.

Judge Ness: Did you punch a time clock?

The Witness: Yes I did.

Judge Ness: Do you know whether or not Jim Keener punched a time clock?

The Witness: Yes he did.

Judge Ness: He did?

The Witness: Yes.

* * *

[108] *Recross Examination*

Q. (By Miss Edwards) What job does Tom LeBlanc have? A. Tom LeBlanc?

Q. Yes? A. When I was let go I think he was part general manager, too. They switch off so often.

Q. Does he punch a time clock? A. Tom?

Q. Yes. A. Yes.

* * *

Q. (By Miss Edwards) In addition to the time clocks, were there time slips that had to be filled out? A. Yes.

Q. By production workers? A. Yes.

Q. And what was the purpose of the time slip? A. I guess to know how many parts were done weekly.

Q. Now, did you fill out any time slips? A. No.

Q. Did Jim Keener? A. No.

Q. Al Berry? [109] A. No.

Q. Do you know anybody else, any other employes who did not fill them out? A. I don't believe Tom—well maybe Tom LeBlanc did. No, I don't know of any others.

Q. You don't know of any other employes? A. NO.

Q. Now, during the night shift if somebody was goofing off, you know, standing around talking, would you say anything to them? A. Only if it was a ridiculous amount of time.

Q. You did say that? A. Right.

Judge Ness: It did happen?

The Witness: Yes, that aspect happened. Yes.

Q. (By Miss Edwards) And you sent them back to their machines? A. Yes.

Q. All right, if you had gone on days when you asked for permission to do that, who else would they have had to run the shift, the afternoon shift? A. Well, they still had Jim LeBlanc. He's the one that ran it before me.

Q. Was he working days then? A. Yes he was.

[110] Q. And it would have meant putting him back on days—or afternoons? A. Yes it would have.

Q. All right. I think you said your first activity—union activity—was when you got the cards from Stan. Now, isn't it true that your first activity was when you gave Stan a phone number to call? A. Yes, that's true.

Q. To start the organization and to initiate—? A. I gave him the phone number, yes.

Q. To initiate the first contact with the union? A. Yes.

Q. And you had talked with Stan before that? A. Yes.

Q. And had you talked with him anyone else about organizing a union? A. No, I don't believe about organizing—maybe mentioned it in passing. Nothing very serious, I don't believe.

Q. You said that when you gave these cards to some of the people you explained to them that the purpose was to get an election. That you would have to have a majority of the cards to get the union interested at all. Is that what you said?

Judge Ness: Wait a minute. Wait a minute. I am afraid you are—as best as I recall—. If you want to ask the witness again what he said, but you are almost trying to [111] quote him. But I think that's a little misleading.

Q. (By Miss Edwards) All right, now when you got the cards and you started getting people to sign them, what did you expect would happen next? What was your understanding? A. My understanding, if we got enough the union

would be interested. And send some kind of a letter to the shop, asking for an election.

Q. That was your understanding? A. That was my understanding.

Q. And that is what you told other people in asking them to sign the cards? A. Yes, pretty much so.

Judge Ness: Well, when you say pretty much so, let's be more specific.

The Witness: I would tell them that in order to get the UAW interested, we would have to have a majority of the people sign cards to let the UAW know that there was enough people in the shop interested in the union. That someday we might have to vote on it, on the union.

Miss Edwards: That's all.

Mr. Lewis: Just a couple of questions, Your Honor.

Further Redirect Examination

Q. (By Mr. Lewis) Did Mr. Hulett fill out time slips if you know? A. Yes, he did.

[112] Q. And what was the conversation that you had with Mr. Stanley before he went and got the supply of cards? That is, the conversation about the union? A. Somehow we had to go to talking about a guy named Kenny Konchel that had gotten fired the same time I got disciplined for not coming back to work after lunch. I got called back. Pete Jaime got called back, but they never called Kenny Konchel back. So we got to talking about that and Steve was kind of mad about it. And I mentioned that I had the phone number of the UAW. And he said, give it to me. And he took it and called.

Q. That's all the conversation you recall now at that point? A. Yes.

Mr. Lewis: No further questions.

Judge Ness: One question.

While you were on the evening shift, during the course of the normal day, you worked an eight hour day?

The Witness: That was normal.

Judge Ness: Tell us what you did during this time?

The Witness: On the night shift, well, first I ground tools that had to be put into the screw machines daily after each shift. I did that. I usually put in an eight and a half, nine hour day. And put the tooling in the screw machines.

[113] Judge Ness: About how long did that take?

The Witness: Oh, about an hour and a half.

Judge Ness: I am talking about a normal day?

The Witness: A normal day. About an hour and a half, and then I would ask Jim what he had for me. Usually he would have something, some kind of a job for me. Maybe to grind some tools for the machines. Some different tools that needed to be changed every few months. And then I loaded the trucks, any trucks that came in, I loaded.

Judge Ness: You did this yourself?

The Witness: I loaded and unloaded. And answered the phone and locked up.

Judge Ness: Well, what about with respect to other employes?

The Witness: Well, if their machine broke down, if it was something minor, I tried to fix it. I tried to be by every hour to each machine to make sure that the part was to print.

Judge Ness: Is it your testimony then that you worked through most of your shift?

The Witness: Yes, they would try to have something for me to do, yes.

Judge Ness: Well, if you weren't occupied physically yourself?

The Witness: There are times I would run production [114] on parts.

Judge Ness: Did you also observe what other employes were doing?

The Witness: Yes.

Judge Ness: Why?

The Witness: Well, if they were standing around talking for any length of time, I would mention to them to get back to work.

Judge Ness: Anything further?

(Witness excused.)

* * *

Mr. Lewis: General Counsel would call as our next witness Mrs. Audrey Champeau.

AUDREY CHAMPEAU

A witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

* * *

Direct Examination

Q. (By Mr. Lewis) Mrs. Champeau, have you been employed by Machine Tool Gear Inc.? [115] A. Yes I have.

Q. And when did you become an employe of the company? A. September, 71.

Q. Are you still working for them now? A. No. I got laid off in December of 76.

* * *

Q. Had you requested to be laid off? A. Yes sir, I did.

* * *

Q. (By Mr. Lewis) I show you what is marked as GC21. If you would just look at that, Mrs. Champeau. And then I'll ask you whether that is your signature on the card? A. Yes it is.

Judge Ness: What number is this?

Mr. Lewis: General Counsel's 21, Your Honor.

Q. (By Mr. Lewis) And I see the date on the card, 11-24-76. Was it signed by you on November 24th? A. Yes it was.

Q. And did I understand that you were working on the day shift? A. Yes I was.

Q. How did you get the card? Where did you acquire it from? [116] A. They were brought into the lunchroom. And we filled them out and I do not know which one of the boys took them after that.

Q. Do you recall who brought them? A. No, sir. I don't.

Q. Was this during a break? A. Our regular lunch hour.

Q. Did you have any occasions during 1976 when Greg Stone worked on your shift? A. To work for Greg?

Q. Well, when you were working on the same shift? A. Yeah, I worked with him.

Q. All right. And you would have been on the day shift, right? A. Right.

Q. Now, when were those occasions when Greg would have been on the day shift? A. He would be called in when Jim Keener was off.

Q. And what would his duties—that is, Greg's duties—be when he was in on the day shift? A. Ordinarily we each had our own machine. We would start in the morning, and then if we ran out of work Greg had authorization to put us on another job.

Q. Were you ever told by the company what authorization he had, or was it simply a case of his doing this? [117] A. We weren't told on days. But we knew he was the afternoon supervisor, so to speak, so when he was on days and Mr. Keener was off, we just took it for granted that's who we went to.

Q. Did he sometimes direct you to go to a different machine or work than you had been doing A. Yes.

Q. And what would be the reason for that? Can you just give us an illustration? A. Well, the special job that I had. I would run out of work parts. And I would have to go on to another job.

Q. How many other jobs were there—? Strike that please, Your Honor. I'll ask this question: What was your normal job in the fall of 1976? A. I ran the grinder, the grinding machine.

Q. And what other jobs were you able to do from your experience? A. Roto-flow and retap and packing.

Q. When you ran out of work on the grinder, were you expected to go and tell someone, or did you wait for someone to—? A. Ordinarily Greg was there. Or if he wasn't—if he was busy, Mr. Berry would put us on whatever job was open that I was capable of doing.

Q. Was Mr. Berry always there during the day? A. Yes.

[118] Q. Was there any occasion in which Greg Stone had anyone disciplined to your knowledge? A. Not to my knowledge, no.

Q. How about Mr. Keener, do you know whether he had anyone disciplined? A. Not that I know.

Q. If you know, has Mr. Keener ever recommended you or anyone for a raise? A. Mr. Keener was the one that would go in for our raises.

Q. And do you know whether Greg has ever gone in for a raise? A. Not to my knowledge.

Q. Did you ever receive a cash bonus during the time you worked for Machine Tool Company? A. The only bonuses that we got were like our holiday pays, Christmas and that. We might get an extra day, or at Thanksgiving. That was the only thing. No cash bonus, like vacation or anything. But our regular holiday pays and things.

Q. When you say an extra day, did you mean you would be paid for the holiday while given the time off? A. Well, like Thanksgiving is on Thursday, we would get paid for Friday, and then the four days.

Q. You would not work Friday or Thursday? A. Right.

Q. Do you recall any layoffs prior to the lay off of December, 1976? [119] A. In the five years I worked there we were laid off nearly every year for a certain period of time.

Q. Now, was that at a certain time of year? A. Not always. Sometime it might be—we only had one machine that ran some parts. If it broke down it might be three weeks before they would get the parts to fix it. It would stop the whole line. That would be three weeks layoff there, two weeks, or whatever.

Q. Do you recall a layoff which is said to have occurred in the fall of 1975, a year before the lay off they were speaking of? A. Yes I do. And that was, the roto-flow was broken down. We were off three weeks because of that one machine.

Judge Ness: Were you caught in that lay off?

The Witness: Yes I was.

Judge Ness: Were you told whether it was going to be a permanent or temporary lay off?

The Witness: Well, they figured it would be two to three weeks before they would get the part.

Judge Ness: That's what they told you?

The Witness: Yes. To get it ready.

Q. (By Mr. Lewis) Do you recall how many people on all shifts were laid off at that time at the end of 75? A. I know all the women were off. And I don't know how many of the men, because the men could be transferred to the [120] back of the shop.

Q. How many people do you know were laid off?

Miss Edwards: I don't want to truncate your examination

in any way Mr. Lewis, but we have a list of the people that were laid off and recalled, going back to 1974 for all of the lay offs. We would be willing to put that list in if it would help.

Mr. Lewis: Well, I am willing to have the witness answer the question, Your Honor. The list may be more precise. I think the witness spoke with certain people. Rather than—.

The Witness: I would say between—.

Judge Ness: Rather than relying upon her memory, if you want something more precise?

Q. (By Mr. Lewis) Did you understand my question? I could perhaps repeat it. A If I was just guessing, I'd say fifteen to twenty at that time.

Q. Those were women employes? A. Women and some of the men.

Mr. Lewis: No further questions, Your Honor.

Cross Examination

Q. (By Miss Edwards) What was Jim Keener's job? A. He was our day supervisor.

Q. Now, you testified that you signed the card on November 24th? [121] A. Yes.

* * *

Q. (By Miss Edwards) Did you fill that in yourself? A. Yes.

Q. And you don't recall who handed you the card? A. I don't recall and I don't recall who picked it up.

Q. Would you recall if it was a fellow employe? A. It was one of those fellows who came and got it.

Q. One of the other machine operators? A. Right.

Q. Did he say anything to you specifically about having an election?

Judge Ness: What are you talking about, the one who picked it up or the one who gave it to her?

[122] Q. (By Miss Edwards) The one who gave it to you or the one who picked it up? A. No.

Q. Did you read the card before you signed it? A. Yes.

Q. And did you expect that there would be an election? A. They were talking just in passing about having an election in a week or two. That's the most I heard of it.

Q. Is that what you expected would happen? A. Within a couple of weeks, yes.

Q. That there would be an election? A. Well, a meeting. I didn't know about an election. But I knew they were planning a meeting.

Q. A union meeting? A. Right.

Q. Now, did you have any reason to believe when you signed that card that there would be a union election afterward if a sufficient number of people signed? A. I don't know. I couldn't say.

Miss Edwards: Thank you.

Mr. Lewis: Just one question, Your Honor.

Redirect Examination

Q. (By Mr. Lewis) Had you had any previous experience at other places where unions attempted to organize? A. No.

* * *

[123] Mr. Lewis: Your Honor at this time we have had marked as GC proposed exhibit 22 copies of W4 forms, my interest in which is the copy at the foot of that document, referring to Nabil Ajami. And I would offer this document into evidence at this time for that purpose.

Miss Edwards: For what purpose?

Mr. Lewis: The signature of Nabil Ajami.

Miss Edwards: And then what do you then expect to use that for?

Mr. Lewis: Your Honor, at this point that's our business.

Miss Edwards: Well, if you are going to use it for the basis of comparing the signatures in the absence of any testimony, then my objection is that it is immaterial and irrelevant, because you are not a handwriting expert to my knowledge; unless you are willing to produce somebody that the signature on the W4 form and I presume your authorization card are identical. Or the signature of the same person, we object.

[124] Mr. Lewis: We suggest, Your Honor, under the new rules of evidence a handwriting expert is not required, particularly rule 901(b). Or actually (b)(3) I think is more apt, Your Honor.

Judge Ness: 901 what?

Mr. Lewis: (b)(3).

* * *

[125] Judge Ness: What I am saying is, if this is your testimony to support the cards, I am not deciding right now whether or not I am agreeing to be the one who is going to make a comparison.

Mr. Lewis: The rule gives discretion on this.

Judge Ness: If that's the only evidence rule, you do it at your own risk. I think there have been cases both ways. It may not reach that far. It may not have to. But if I do have to make that decision, I will have to do some homework on it. Some research.

So, as I said, I'll receive 22.

* * *

[126] Mr. Lewis: Yes, Your Honor.

May we have this marked as the next General Counsel's number?

* * *

Miss Edwards: I have the same objection to 23.

Mr. Lewis: We haven't offered it yet, Your Honor, but I am going to now.

Miss Edwards: There has been no foundation laid for it either whatsoever.

Nobody has identified that card. Nobody has said where it came from or the circumstances or anything else. And there is absolutely no foundation for its admission into evidence.

Judge Ness: All I know so far, Miss Edwards, is that the document has been marked for identification. Nothing else is before me at this moment.

Mr. Lewis: At this time, Your Honor, we would offer it.

Judge Ness: For what purpose?

Mr. Lewis: To prove an authorization by this individual.

Judge Ness: As of a certain date?

Mr. Lewis: As of the date shown on it.

[127] Judge Ness: As of the date shown?

Mr. Lewis: Yes. That seems to be 11/29/76. I'm sorry, 11-22.

Judge Ness: That's the date shown on that card?

Mr. Lewis: Yes.

Judge Ness: That's all you have in support of that card?

Mr. Lewis: Yes.

Judge Ness: And you are objecting?

Miss Edwards: Yes, sir. I have stated my objections. There is no foundation laid.

Judge Ness: I'll reject the card; separate and apart, a proper foundation has not been laid.

* * *

MICHAEL CHAMPEAU

A witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

* * *

[165] *Direct Examination*

Q. (By Mr. Lewis) Mr. Champeau, are you present under a subpoenae from the General Counsel of the Labor Board? A. Yes.

Q. And are you presently employed at Machine Tool and Gear, Inc.? A. Yes.

Q. And just for background, when did you first become employed there? A. July of 74.

Q. And have you worked steadily since that time there, or has your employment been interrupted? A. It's been interrupted off and on.

Q. Many times? A. Two or three times.

Q. How long have you worked there continuously at the present time?

Judge Ness: Was it about August of 76?

The Witness: Yes.

Judge Ness: GC4 shows that hiring date.

Q. (By Mr. Lewis) What is your present job there? A. Machine operator.

[166] Q. And would I be correct that you were not laid off in the lay off that we have heard about at the end of November or the beginning of December last year? A. No, I wasn't.

Judge Ness: You were or were not?

The Witness: No.

Q. (By Mr. Lewis) What shift were you on at that time in November of 76? A. Day shift.

Q. And who was your foreman then? A. James Keener.

Q. (By Mr. Lewis) I show you a card that has been marked G30, Mr. Champeau and ask if you would look at that card.

* * *

[167] Q. (By Mr. Lewis) The question was whether you recognize that signature on the card? A. Yes I do.

Q. Is that your own? A. Yes, sir.

Q. And I see the date on the card there is November 23rd, 76. Was that the date that you signed the card? A. Yes.

Q. Do you recall who gave you the blank for that card? A. Steve Stanley.

Q. And after you had signed it, can you recall what you did with it? A. I gave it to Greg.

Q. That's Greg Stone? A. Yes.

* * *

[168] Q. (By Mr. Lewis) Now, Mr. Champeau, could you tell us about the signing of that card? Where did you sign the card? Where were you when you signed it? A. At the foreman's desk.

Q. And let's see, that was Mr. Keener? A. Yes, sir.

Q. Was Mr. Keener present at that time? A. Yes, sir.

Q. Who else, if anyone was present right there? A. Peter Jaime and Daniel Jaime.

Q. And what conversation, if any, passed among you? A. Oh, I borrowed the pen off my foreman, Jim Keener, and he asked me what I wanted to do with it. And I told him to sign a union card. And he said, well, you are going to be the only one. I said, I doubt it. And that was just about the extent of our conversation.

Q. Did the other two men who were with you enter into the conversation? [169] A. No, sir.

Q. Now, were you aware when the Jaimes were laid off, the Jaime brothers? A. Well, I was aware that evening, just by my ma, Audrey Champeau, she used to work there.

Q. You had heard that there had been a lay off I take it? A. Yes.

Q. And this was approximately the first of December? A. Right.

Q. Did you—strike that please, Your Honor. Just what work were you doing around that time? Can you describe your work a little more? A. I was running the centerless grinders most of the time.

Q. Did you notice any difference in the volume of work for the time, the hours that you worked following that lay off that occurred to other employes? A. Well, about ten days to two weeks after the lay offs, we started on ten hours a day.

Q. And how much had you been working during the month of November? A. Well, I, myself, was working nine, ten hour days off and on during November. But the rest of the shift was only working strictly eight hours.

Q. Was the whole shift working the ten hour day in December, [170] the time you mentioned? A. Yes. After the lay off.

Q. I take it, it did not affect your own hours particularly. Did you work more than before. Or did you work remain normal? A. I worked more than before the lay off.

Q. Now, following your signing the card—strike that please, Your Honor. Did you hear testimony here yesterday, Mr. Champeau, indicating that there had been a union meeting somewhere—that's outside the plant apparently? A. Yes.

Q. Did you attend that meeting yourself? A. Yes.

Q. Following the meeting, did Mr. Tim LeBlanc ever mention the union meeting? A. Yes.

Q. When was the first time it was mentioned by him? A. Not long after the meeting. I can't remember precisely.

Judge Ness: Well, was it a matter of two days, a week?

The Witness: Seven days to two weeks, after that.

Q. (By Mr. Lewis) And how did the matter come up. Was this a face-to-face conversation, or phone, or how did you talk to him? A. I was running a surface grinder at the time and he came up to the machine and he asked me how my mom was doing. And then he asked me if, you know, he heard about the union meeting [171] and he asked me if the people he laid off were at the meeting. I said, yes. And he asked me if the people—if any of the people who were still working were at the union meeting. And I said, no, just myself. And, let's see, he said that we should have never joined the company if we wanted a union in there in the first place, because he said we understood when we signed the contract that there should be no union allowed in the shop. And that's about it, that I can remember.

Q. What was the contract that Mr. LeBlanc was speaking of there? Do you know? A. Your application you signed for the company, to join the company.

Q. I see. Did you sign such an application when you first became employed there? A. Yes.

Q. Did Mr. Tim LeBlanc ever mention or ask about any particular employe by name as to whether that person had been at the union meeting? A. He did mention one person's name. But I can't quite recall which person that was.

Q. Was that in the conversation that you just described? A. Yes.

* * *

[178] Q. Did you ever have any discussion with anyone in management besides Mr. Tim LeBlanc, any discussion in which the union meeting was mentioned? A. Yes, with Mr. Al Berry.

Q. And when was this discussion? A. Either the day after or two days after the union meeting.

Q. And what was said—well, let me start out, what time of day was it, if you recall? A. After lunch I am pretty sure, right after lunch.

Q. And where were you when he spoke to you? A. In the middle of the shop.

Q. How did the discussion start? Did he approach you or you come to him? Tell us about it? A. Well, I was walking back from lunch and he approached me, and we stopped and that was how it started.

Q. And tell us what was said by either one of you? A. He asked me if I went to the union meeting, and I said, yes, [179] and I asked him how he found out about it. He said that I told Jim Keener before the union meeting. And he asked me if there is anybody else that works there that went to the union meeting. And I said no. And he just says, ah, come on Mike. I says, no, really, And that was the extent of the meeting.

Q. Had you ever mentioned this matter to the best of your recollection to Mr. Keener? A. No, sir.

Q. Did you receive a bonus at Christmastime of 1976? A. Yes, sir.

Q. How much was the bonus? A. It was a forty hour week check.

Q. Meaning forty times your hourly rate? A. Yes.

Q. Had you ever received a cash bonus before while employed there at Machine Tool and Gear? A. No, sir.

* * *

[180] *Cross Examination*

Q. (By Miss Edwards) Mr. Champeau, you testified that Tim LeBlanc came up and talked to you on the machine? A. Yes, ma'am.

Q. Have you seen Tim talking to other employes at their machines? A. Yes, ma'am.

Q. It's not unusual, in other words, for him to go out into the shop and talk to people directly, is it? A. No ma'am.

* * *

[181] Q. And what did he talk to you about before?

Mr. Lewis: I think, Your Honor, that question might be pinpointed in time.

Miss Edwards: I am just trying to establish—.

Judge Ness: That's a proper question. You may answer it.

The Witness: Them two times were warnings. One time was for the union meeting.

Judge Ness: No, the question is, at other times, did he come up to your machine and talk to you at other times about other subjects?

The Witness: Only if—once or twice he has went up to James LeBlanc, his brother, and talked to him and then he came over and said hi. We had slight conversations once or twice.

Q. (By Miss Edwards) Did he say anything about how your production was going or anything like that? A. No, ma'am.

Q. And you saw him talking to other employes? A. Yes, ma'am.

Q. Who was the foreman on the afternoon shift? A. I don't think they had any ma'am.

Q. Did you work the afternoon shift? A. When I worked the afternoon shift back in 74 it was James LeBlanc.

* * *

[182] Q. (By Miss Edwards) Witness, I hand you your affidavit, and I direct your attention to the sentence in parens at the top of page six, and then I would ask you to read that out loud. A. Kirk is the assistant supervisor under Stone

on the afternoon shift. Jim Keener taught him how to set up and run the machines. I never worked for Kirk. I told him yes.

Judge Ness: I told him what?

The Witness: Told him yes.

Q. (By Miss Edwards) All right, is that statement true? A. Yes ma'am.

Judge Ness: What did you base that statement on?

The Witness: Well, the people that know the most about [183] operating and setting up the machines are usually—like there's very few. And, really, the only—. Like there's head supervisors, Jim LeBlanc, Jim Keener and Al Berry. And the rest of the people, like around the shop it's known they know how to fix and repair the machines better than the typical worker there. So he is automically considered a helper and a supervisor in the shop.

Q. (By Miss Edwards) Who are you referring to when you say the others? A. Tom LeBlanc; Kirk. I forget his last name. Greg Stone, and like if I operated, like, say, I was taught the O.D. grinder, if something happened to that machine and like my supervisor Jim Keener was not around, then I would go to a person that ran this O.D. grinder previously for awhile and knew how to set up and repair that machine, the O.D. grinder.

Q. Now, did Greg Stone ever work in Jim Keener's place while you were at work? A. Yes ma'am.

Q. Did you observe him shifting people from one job to another? A. Myself? Yes, ma'am.

Q. And he shifted you? A. Yes, ma'am.

Q. And this is when he is substituting for Jim Keener? A. Yes.

[184] Q. And was it his responsibility to make sure that the quota that you needed for that day was completed? A. Yes ma'am. I imagine so.

[231] ROBERT HARRIS

A witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Judge Ness: State your name and address please.

The Witness: Robert Lee Harris. 4205 Ferris, Apartment 24, Lincoln Park.

Direct Examination

Q. (By Mr. Lewis) Mr. Harris, are you present under a [232] subpoenae from the General Counsel of the Labor Board? A. Yes.

Q. And are you presently employed at Machine Tool and Gear? A. Yes.

Q. And as of November, 1976, you were on the afternoon shift? A. At that time.

Q. At the time the cards were passed out, for example? A. Yes.

Q. And could you tell us just what your job consisted of at that time last fall? A. I was running the grinder; you know, that was my basic job. And I switched around. But that's what I was usually running.

Q. I am going to show you General Counsel's exhibit 14, and ask if that is your signature on the card? A. Yes.

Q. And I see the date November 22nd, 1976, on it. Was that the date that you signed it, Mr. Harris? A. Yes.

Q. Now, when you were laid off, I understand this occurred about the beginning of December, 1976? A. Yes.

Judge Ness: Doesn't it say 11-30 on the exhibit?

Mr. Lewis: I would certainly take your word for it, Your Honor.

[233] Q. (By Mr. Lewis) I would ask you, then, were you paid at that time? A. When I was laid off?

Q. Yes? A. No.

Q. When were you paid for the last work that you had done? A. I went back, it was either that Thursday or Friday and got the check for that past week, and that first Monday.

Q. And did you have any conversation with anyone, or do anything else at the time you stopped for your checks? A. Just the secretary.

Judge Ness: How did you know you were laid off?

The Witness: I was called.

Q. (By Mr. Lewis) When were you called? A. I was called Tuesday afternoon.

Q. Was that going to be a day that you would work? A. Yes.

Q. Were you still at home when you received the call? A. Yes.

Q. About what time of day was it? A. 2:30.

Q. Who was it that called you? A. Al Berry.

Q. And can you recall what was said by either of you on the phone? [234] A. He just said that the afternoon shift was being laid off; that there has been a cutback and that he did not need all the parts, you know, that he had been producing. And I asked him how long it would be, and he said, three to four weeks, right around in there. I said, all right. Then I asked him, you know, if I could come and get my check, or could it be mailed. And he said they would go ahead and mail it, which he forgot about the safety glasses.

Q. When did you hear about those? A. Well, Dennis Ladanyi, he went and picked his check up the Wednesday or Thursday, and he told me, because I asked him to ask about it, because I did not get it in the mail. And he told me that I was to go down there to return my safety glasses. Then I would get my checks.

Q. Had you been laid off before this time? A. No.

Q. Had there been any particular occasion when other employes around you at Machine Tool had been laid off, even

though you had not? A. There was a time. There was a lay off, but I was not—.

Q. That was one particular time? A. Right, during the Ford strike.

Q. Can you date that from your recollection? A. No.

Q. Was it in this past year? [235] A. Ya, it was 76.

Q. Was it during warm weather? Was it from spring to fall? Or is there any way that the season can be identified?

Judge Ness: I think Miss Edwards had indicated she had records of previous lay offs. Can't you agree when this 76 lay off was?

Miss Edwards: Well, it was in September. That's when the Ford strike started. The Ford strike started in September and the lay off was 9-26-76.

Q. (By Mr. Lewis) Does that sound like the occasion you are remembering? A. Yes.

Judge Ness: Were you caught in that lay off?

The Witness: No.

Q. (By Mr. Lewis) Was there any explanation that you know of why you were not laid off if others were? A. It was either Al or Jim, I don't remember which one, come up to me and said that they were switching me to days.

Q. That was either Mr. Berry or Mr. Keener? A. Yes.

Q. Did he give any further explanation of the matter? A. No. I did not argue.

Q. And you then did switch to days? A. Yes.

Q. How did that end, did you stay on days as long as the [236) lay off was going on? A. Yes.

Q. Now, at the time that you were recalled from your lay off from the December—the November, December lay off that we are speaking of in this case, the time that you were recalled, who was it that informed you? A. Who called me?

Q. Yes, who called you back to work? A. Jim Keener.

Q. Was that by phone or some other means? A. He called on a Saturday. He called that Saturday, which I was not home. And he told my wife to tell me to call. And I called Monday morning.

Q. And would you describe the phone conversation? A. He said that Audrey wanted to be laid off. First he asked me if I got a job yet. And I said, no, I just been working off and on with my father. And he said that Audrey wanted to be laid off. And he asked if I wanted to come back in her place and run her machine. And I said yes. And he says, all right. And he asked me if I filled out a card and I said no. And he asked me if I went to the union meeting and I said no. And then he says, okay, let me go talk to Tim. And I will give you a call back.

Q. Was that the end of the phone conversation that you had at that instant? A. Yes.

[237] Judge Ness: What happened when you said no? He said, did you fill out a card or go to a meeting?

The Witness: He asked if I filled out a card and I said no. And then he asked if I went to a union meeting and I said no.

Judge Ness: And then what did he say?

The Witness: Then he said he would go talk to Timmy, you know, about hiring me back.

Q. (By Mr. Lewis) Now, when the phone conversation ended, did he in fact call you back? A. Yes.

Q. About how long after he hung up was that? A. About twenty minutes.

Q. All right, would you describe the second phone conversation? A. He said, okay, you know, it was alright with Timmy, that they would be laying off Audrey and make that her last day.

Judge Ness: I'm sorry. I didn't hear that?

The Witness: He said it was all right with Timmy, and he would make it be Audrey's last day. And he told me to start

back on days Tuesday morning. He told me to make sure I was there and I said all right.

* * *

[245] *Cross Examination*

Q. (By Miss Edwards) I think you testified that you signed [246] General Counsel's exhibit fourteen? A. Yes.

Q. And did you sign it on the date that is on there? A. I didn't fill out the top half.

Q. You didn't fill out the top half? A. No.

Q. Who filled it out? A. Greg. I cannot read or write.

Q. What did Greg tell you when he gave you the card? A. Well, he explained the card.

Q. Well, what did he say? A. Okay. Well, he said, this is the card to let the union know—. He said he needed so many of these cards to let the union know the people were interested in having a vote.

Q. All right. A. And he needed a majority of the cards to do any good.

Q. All right, and then you signed it? A. I asked him to fill it out.

Q. And he did? A. I told him why, and I asked him if he would fill it out and then I'd sign it.

Q. All right, and where were you when this conversation took place? A. In Al Berry's office.

[247] Q. And when was this, what time of day? A. When we talked about it?

Q. Yes, and when he filled out the card and you signed it? A. We talked about it during lunch; okay?

Q. I see. A. Everyone filled the cards out but me. And I did not fill mine out right at lunch; okay? And then after lunch I went back to my machine and was thinking about it, because I was not sure whether I was going to sign it or not. And we kept talking about it and everything. And

then I told him all right. And then I told him he would have to fill it out, and I would sign it.

Judge Ness: Did you then sign it? That is your signature?

The Witness: Yes. That is my signature.

Q. (By Miss Edwards) And this—the second part of this activity took place during working hours? A. Yes. This was about 10, 10:30.

Q. All right. Now, Greg Stone was your foreman, was he not? A. I asked him for advice.

Q. Well, what would you say his job was? A. Well, you know, if you had any problems, like say with the machines or anything, you would go with him.

Q. What was his title?

[248] Judge Ness: Do you know if he had a title?

The Witness: I never called him by a title. I just called him from hearsay, by me working there. I was never told a title to give him, that he was a foreman or anything like that. I was not told that directly. I was just told, if I have any problems or anything, to go tell him, unless Jim was there. Now, when Jim was there I would go to him.

Q. (By Miss Edwards) When Jim was not there you would go to Greg for exactly the same things that you would have gone to Jim for? A. Except for a raise, or, you know, if I wanted to ask him about hiring somebody. But as far as any of the running of the machinery or any breakdowns or anything, you know, if Jim was not there, I would go to Greg. If this broke or something like that, and see what he could do.

Q. Now, you say you do not read. I would assume then that the agent from the Board read this statement to you? A. My wife did.

Q. Your wife read your statement to you? A. After it was written out, she told me to read it and I told her I could not. And then I asked her if she would.

Judge Ness: When you told her you couldn't read it, are you talking about the Board agent?

The Witness: Yes.

Judge Ness: It was a female that took your statement?

The Witness: Yes.

[249] Judge Ness: Not your wife?

The Witness: Not my wife. And then I asked her if she would read it. And she would prefer if my wife would read it. So my wife read it to me.

Miss Edwards: I can't very well give it to him and ask him to read it and ask if his statements are true, right?

Judge Ness: That's right.

Q. (By Miss Edwards) Now, referring to page two, the second sentence, I am reading from the statement: "I know Greg Stone because he was the foreman on the night shift." Did you make that statement? A. Yes I did.

Q. "If Keener was absent for more than a day, Stone would be called in to work the day shift as a foreman." Did you make that statement? A. Yes.

Judge Ness: Wait a minute. Was that a true statement?

The Witness: I said that.

Judge Ness: I am asking you, is it a true statement?

The Witness: Well, I said foreman. Sometimes he's a foreman. You know, sometimes he's just the help. I just used the foreman because that's the way I took it.

Mr. Lewis: Excuse me. Before we go on, Miss Edwards, could you tell me what spot we are in?

Miss Edwards: Second sentence of page one.

[250] Mr. Lewis: Oh, that's easier to find.

Q. (By Miss Edwards) "He had the authority to tell me where to go and what to do." Now, by that statement did you mean Greg Stone? A. I meant when Keener wasn't there.

Q. Were you here when Stone testified that Keener and Berry could customarily stay until 5 or 5:30? A. Yes.

Q. And what time did your shift let out? A. Afternoons?

Q. Yes. A. When did we leave at the end of the day?

Q. Yes? A. 12 o'clock.

Q. So that for approximately six or seven hours of the shift, Stone would generally be the only one there, is that right? A. Yes.

Q. Now, referring back to the statement, "he did assign me to another machine when I would run out of parts on my machine, or if it broke down." Is that true? A. Yes.

Q. And again you mean Stone? A. Yes.

Q. "If any of the guys were goofing off, he would tell us [251] to stop and go back to work?" A. Yes.

Q. And by he you mean Greg Stone? A. Greg Stone.

Q. And that's true? A. Yes.

Q. "He did the same work as Keener, but he could not hire or fire?" A. Right.

Q. Do you know if he could recommend that someone be hired? A. I could not say.

Q. "I have worked the afternoon shift since I have been employed." Was that true? A. Yes.

Q. "Stone would be the only supervisor in the shop on the afternoon shift." A. Yes.

Q. Is that statement true? A. On the afternoon shift.

Q. "He would train employes on the afternoon shift." A. What he would do—okay? Like we would come—okay, like somebody was hired, okay, to come in at 3:30. Okay. Jim would tell them where to go and so on, you know, show them the machine and everything. Now, Jim left; okay. Like when I first started, okay, after Jim left, I had problems. [252] So I would go to him and he would show me what I was doing wrong. Show me how to fix it, or whatever. Show me how to run it.

Q. And that is in your statement, is it not, "he had shown me how to handle a particular problem on my machine?" A. Yes.

Q. "But I was trained by Keener and another employe." Is that statement true? A. I was trained by Keener.

Q. And another employe. A. What do you mean by another employe?

Q. I don't know. That's what's down here. A. Well, when Keener ain't there, Greg would show me what to do.

Q. "If we overstayed our breaks. Stone would tell us, it's time to get back to work." Is that statement true? A. Yes.

Q. Now, I think you testified that when Al Berry called you to tell you that you were being laid off, that he did not give you any reason. Did you say that? A. No. I said that he said that it was a cut-back from Fords.

Q. I see.

Miss Edwards: That's all.

Oh, I have one more question. I'm sorry.

Q. (By Miss Edwards) Mr. Harris, when overtime is [253] available, do you generally work overtime? A. I argue about weekends.

Q. But—. A. Weekdays I'll go and generally work them, but weekends I work them, but I usually argue about them.

Miss Edwards: Thank you.

Mr. Lewis: Just a couple of questions if I may, Your Honor.

Redirect Examination

Q. (By Mr. Lewis) Mr. Harris, did someone tell you when you were first employed on the night shift, did someone tell you to take any problems to Greg unless Keener is there or words to that effect? A. Yes.

Q. Who was it who told you that? A. I forget his name.

Judge Ness: Was it one of the bosses?

The Witness: He worked there at the time.

Judge Ness: Just one of the employes?

The Witness: He was the employe who got me in there. He mentioned to Keener about me. Rich. Rich Lynch.

Judge Ness: Was he just another employe then?

The Witness: He just worked there.

Q. (By Mr. Lewis) Rich Lynch. Is he any relation to the Mrs. Lynch who testified yesterday? A. That's his mother.

[254] Q. As far as you recall, no one else ever gave you that instruction besides Rich? A. No, he just told me like, because he was over there by my machine and I would ask him, when I first started, because he was the only one I knew. And I asked him, if I've got any problems, who do I go to? And he said go to Greg. He said, he runs the afternoon shift. If you ask him for—you know, if you need anything, if anything breaks or anything.

Q. Did Mr. Keener hire people? Did he hire you? A. Yes.

Q. Did he talk to you before you actually came to work there? A. Yes.

Q. Was he the only person who did interview you before you did come to work there? A. Yes.

Q. And what did he tell you at the end of the interview? Did he tell you you were hired, or did he say something else? A. He asked me when I could start work. And I said as soon as possible. And he says, okay, start tomorrow afternoon.

Mr. Lewis: No further questions, Your Honor.

* * *

[255] The Witness: Yes.

Judge Ness: During the period of your layoff, was there a union meeting?

The Witness: Let's see. I don't remember if it was right at —between that week. There was one, but I can't say it was right in that week.

Judge Ness: Was it before you came back to work?

The Witness: I was called—let's see. I can't say.

Judge Ness: Well, I think you testified Berry called and spoke to your wife?

The Witness: No. Jim Keener called.

Judge Ness: Called on a Saturday and talked to your wife?

The Witness: On a Saturday, yes.

Judge Ness: And according to the evidence at least in now, you went back to work on Tuesday the 7th; the Saturday before was the 4th. Now, it was on Monday you say you spoke to Keener yourself on the telephone? A. Yes.

* * *

Judge Ness: This is the Saturday before you returned to work?

The Witness: Yes.

[256] Judge Ness: And tell us again what the conversation was about? You identified yourself, right?

The Witness: Okay. Yes. I asked for Jim Keener and told him who I was. And he goes, he asks me if I had a job yet. And I said no, I've just been working on and off with my dad. And he said Audrey wanted to be laid off. And he wanted to know if I wanted to come back in her place on days, running her machine. And I said yes. Then he asked me if I filled out a union card and I said no. And then he asked me if I went to the meeting. And I said no.

Judge Ness: Did he say what kind of meeting?

The Witness: The union meeting, and I said no. And he says, all right, let me go talk to Timmy and I'll call you [257] right back. And he called back about twenty minutes later and said to start back Tuesday morning on days.

Judge Ness: Had you signed a card?

The Witness: I signed a card.

Judge Ness: Why did you tell him you didn't?

The Witness: Because I knew they was against it, and I said no.

* * *

No. 80-1036

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In the Supreme Court of the United States

OCTOBER TERM, 1980

MACHINE TOOL AND GEAR, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CANDACE M. CARROLL
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether the Board properly issued a bargaining order as a remedy for petitioner's violations of Section 8(a)(1) and (3) of the National Labor Relations Act.

2. Whether substantial evidence supports the Board's finding that employee Gregory Stone was an employee within the meaning of Section 2(3) of the Act, rather than a supervisor as defined by Section 2(11) of the Act.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-3a) is not officially reported. The decision and order of the National Labor Relations Board (Pet. App. 1b-28c) are reported at 237 N.L.R.B. 1109.

JURISDICTION

The order of the court of appeals (Pet. App. 1a-3a) was entered on September 30, 1980. The petition for a writ of certiorari was filed on December 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth in the petition (vi-xii).

STATEMENT

1. Petitioner manufactures small automotive parts and employs about 40 employees, 30 on the morning or day shift and the rest on the afternoon shift, which runs from 3:30 p.m. until midnight (Pet. App. 1c-3c; C.A. App. 179).[1] At the time of the events herein, the morning shift was supervised by Shop Superintendent Berry and Foreman Keener, both of whom stayed for the first two hours of the afternoon shift (Pet. App. 2c, 3c; C.A. App. 55, 265). When the afternoon shift employees arrived, they would begin work on their regular machines without any instructions since cards posted at the machines indicated the number of parts that were needed to complete a particular order (Pet. App. 3c; C.A. App. 56, 78, 219-220). Before leaving, Berry and Keener would brief employee Stone concerning the parts to be produced for the rest of the shift, and the work that he was to do (Pet. App. 3c; C.A. App. 55, 78, 101-102). Stone, who was senior to the other shift employees and knew how to operate all the machines, was "in charge of" the shift after Berry and Keener left, and a machine operator who ran out of work would look to him for instructions (Pet. App. 3c-4c; C.A. App. 54-55, 97, 135, 153-154). He sometimes moved employees to different machines if this was necessary to produce the required parts (Pet. App. 4c; C.A. App. 54-55, 78-79, 135, 155-156). Stone did not operate a machine, but performed the work Foreman Keener had assigned him, ground tools for the screw machine, and checked to make sure that the machines were operating properly (Pet. App. 3c; C.A. App. 54, 101-102). If employees were standing around talking, he would tell them to return to their machines (Pet. App. 3c; C.A. App. 99, 102, 155). He locked up when the shift was over (Pet. App. 4c; C.A. App. 54).

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[1] "C.A. App." refers to the joint appendix to the briefs of the parties in the court of appeals. "GCX" refers to the General Counsel's Exhibits contained in the record.

Occasionally he substituted for Keener on the morning shift, and had recommended various employees who were hired by management (Pet. App. 4c; C.A. App. 55-58, 87-89, 104-105, 117-118). Stone, however, could not hire, fire or discipline employees, and his recommendations that these actions be taken were not always followed (Pet. App. 4c-6c; C.A. App. 58, 135-136, 105, 154, 156, 213-214).

In November 1976, employees Stone and Stanley distributed authorization cards in the shop for the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW ("the Union") (Pet. App. 2c; C.A. App. 94-95, 99, 101, 60-61, 162-163). By November 24, they had collected signed cards from a majority of the shop's employees (Pet. App. 2c, 20c; GCX 12-21, 24-26, 28-37). During this period, Shop Superintendent Berry questioned Stanley as to "what the deal was" respecting an authorization card Berry had obtained, and told both Stanley and Stone that he was sure that the plant would close down if a union came in (Pet. App. 8c, 7c; C.A. App. 172-176, 68-69). On another occasion, Berry told Stone that Tom LeBlanc, son of petitioner's president, had wanted to fire Stanley earlier that day because of his union activities, but that Berry had dissuaded him (Pet. App. 2c, 7c; C.A. App. 67-68).

Over Thanksgiving weekend, petitioner's president Joseph LeBlanc and another son, General Manager Timothy LeBlanc, learned that a union campaign was going on in the shop and that Stone was passing out union cards (Pet. App. 2c, 11c, 17c; C.A. App. 206-207, 224-225). On Monday, when Timothy LeBlanc returned to the shop, he learned that Stanley was also involved (Pet. App. 7c, 11c, 13c; C.A. App. 252). He summoned Stone to his office, questioned him about his and Stanley's union activity, and tried to persuade Stone to stop; when Stone refused, LeBlanc suggested he seek a job elsewhere with a unionized company (Pet. App. 7c; C.A.

App. 70-71, 207-209, 267). That afternoon, Timothy LeBlanc told Stone that he had decided to lay off the afternoon shift and to transfer Stone to the day shift (Pet. App. 14c; C.A. App. 71, 72). By the end of the following day, LeBlanc had laid off fourteen employees, including four day-shift employees (Pet. App. 14c, 16c; C.A. App. 119-120, 146, 148-149, 289). Two days later, LeBlanc terminated Stone, admittedly because of his union activity (Pet. App. 11c; C.A. App. 73-74, 209-211). On the same day, LeBlanc laid off Stanley for "stirring up a commotion among the workers" (Pet. App. 12c-13c; C.A. App. 173). Stanley told LeBlanc that his action was illegal, but LeBlanc said that he had "checked around" and had been told that this "was the best way to handle it" (Pet. App. 13c; C.A. App. 173). On the very day that Stanley was laid off, petitioner began recalling employees laid off three days earlier (Pet. App. 16c; C.A. App. 75, 289). By the end of January, petitioner had recalled most of those laid off and hired two new employees (Pet. App. 16c-17c; C.A. App. 289-290, 75). Stanley, however, was never recalled (Pet. App. 13c; C.A. App. 289).

In the period following the layoffs, petitioner's supervisors questioned those who wished to return as to their possible union involvement; petitioner also questioned an employee who had not been laid off concerning the union activities of those still working in the shop (Pet. App. 8c-9c; C.A. App. 151-152, 159, 124-125, 221-222). On December 23, petitioner gave its employees a Christmas bonus of a week's pay each as a reward for their "hard work" and "loyalty," although petitioner had been phasing out its practice of giving employees hams and turkeys at Christmas and Thanksgiving and had not given them a cash bonus since sometime in the 1960's (Pet. App. 9c-10c; GCX 3, C.A. App. 222-223, 229, 125-126, 115, 75-76).

On January 12, 1977, the Union wrote to petitioner requesting recognition. Petitioner received this letter on

January 14 but ignored it (Pet. App. 20c; GCX 2, C.A. App. 45-46, 50).

2. Affirming the administrative law judge's decision, the Board found that employee Stone was a leadman and not a supervisor since he was "for the most part * * * a conduit for the management officials" and "[a]ny authority he exercised * * * was within [petitioner's] guidelines, not requiring the use of independent judgment" (Pet. App. 6c). The Board also found that, immediately following its discovery of the union campaign in the shop, petitioner embarked on a "course of unlawful conduct" (Pet. App. 2b). Petitioner violated Section 8(a)(1) of the Act by (1) coercive interrogation of employees concerning their union activities as well as the union activity of others, (2) threats to close the plant if the union were selected as bargaining representative, (3) threats to discharge or deny reinstatement because of employee support for the Union, and (4) granting a Christmas bonus to induce employees to renounce the Union; petitioner violated Section 8(a)(3) of the Act by discharging employees Stanley and Stone for initiating the union campaign, and by laying off fourteen employees in retaliation for the interest shown by employees in the Union (Pet. App. 1b-2b, 21c-22c).

Moreover, the Board found that these unfair labor practices "were both extensive in nature and [in] impact," and that a "natural consequence of such conduct was to instill fear in the employees, to stifle further interest in the Union and to dissipate the Union's majority status already achieved. A fair election cannot, after such conduct, be insured by the use of traditional remedies * * * " (Pet. App. 22c). Therefore, in addition to requiring reinstatement and backpay for those laid off and discharged, the Board, noting that at the time the Union requested recognition it possessed valid authorization cards from a majority of the employees in the

unit (Pet. App. 2b, 20c), ordered petitioner to bargain with the Union as the representative of its employees (*id.* at 6b-7b).

Finally, although the complaint did not in terms allege a violation of Section 8(a)(5) of the Act, the Board also found that petitioner's refusal to bargain after the Union demanded recognition violated Section 8(a)(5). That finding was warranted, the Board stated, because "all of the elements necessary to prove a violation of Section 8(a)(5) of the Act were fully litigated and established" in the course of establishing the need for a bargaining order in this case (Pet. App. 3b).

3. The court of appeals enforced the Boards' order by *per curiam* order (Pet. App. 1a-3a). The court found substantial evidence to support the Board's findings that Stone "did not hire, fire, or discipline, but was a mere conduit for the directions of the [petitioner's] actual supervisory personnel," and, therefore, that he was not a supervisor (Pet. App. 2a). The court also found substantial evidence to support the conclusion that petitioner engaged in activity violative of Section 8(a)(1) and (3) of the Act (Pet. App. 2a). Finally, the court upheld the Board's bargaining order, noting that such a remedy for petitioner's unfair labor practices was "not an abuse of the discretion given the Board under § 10(c) of the Act" (Pet. App. 3a).[2]

ARGUMENT

1. Petitioner contends (Pet. 3-10) that the decision of the court of appeals upholding the Board's bargaining order

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[2]In addition to *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), the court cited *NLRB* v. *Production Industries, Inc.*, 425 F. 2d 1206, 1207 (6th Cir. 1970), in which it had found a bargaining order "necessary and appropriate" on the basis of fewer and less serious unfair labor practices than those committed by petitioner here (Pet. App. 3a).

conflicts with *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), and cases in the Second, Fourth, Fifth, Sixth and Seventh Circuits, in that the Board here did not explain why the unfair labor practices created a situation in which a free and fair election was unlikely. But in fact the administrative law judge did explain that the result of petitioner's extensive unfair labor practices was to instill fear in the employees and to stifle further interest in the Union (Pet. App. 22c), and the Board adopted those findings, concluding that "a free and fair election is unlikely in the[se] circumstances" (Pet. App. 2b). The court below found this exercise of the Boards' discretion proper (Pet. App. 3a). Thus, the decision in this case is fully consistent with *Gissel*, in which this Court approved the use of the bargaining order in cases where the Board finds the employer's conduct has a "tendency to undermine majority strength and impede the election processes," and therefore that "employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order * * * " (395 U.S. at 614).

The other cases cited by petitioner are distinguishable in principle or on their facts. Unlike this case, *NLRB* v. *General Stencils, Inc.*, 438 F. 2d 894, 902-903 (2d Cir. 1971); *NLRB* v. *Appletree Chevrolet, Inc.*, 608 F. 2d 988 (4th Cir. 1979); and *Peerless of America, Inc.* v. *NLRB*, 484 F. 2d 1108, 1119 (7th Cir. 1973) are cases in which the courts were unable to find substantial evidence to support some of the Board's conclusions as to the illegality of the acts on which the bargaining orders were based; as a result, the courts were unsure whether the Board would have issued the bargaining orders based only on the remaining violations. In *NLRB* v. *American Cable Systems, Inc.*, 427 F. 2d 446 (5th Cir.), cert. denied, 400 U.S. 957 (1970), the court denied enforcement because the Board had refused to consider evidence "that a complete turnover in employees and the departure of the only management official involved in the unfair labor

practices made a free election possible at that time" (*id.* at 448). In the instant case, however, the management official responsible for most of the unfair labor practices, Timothy LeBlanc, was petitioner's general manager and the son of petitioner's owner; he is still the most powerful supervisor in the shop and, so far as the record shows, the composition of the unit has not changed substantially. The majority of those employees who were laid off were ultimately recalled or are awaiting reinstatement under the Board's order (Pet. App. 16c-17c). In *Automated Business Systems* v. *NLRB*, 497 F. 2d 262 (6th Cir. 1974); *First Lakewood Assoc.* v. *NLRB*, 582 F. 2d 416 (7th Cir. 1978); and *Red Oaks Nursing Home, Inc.* v. *NLRB*, 105 L.R.R.M. 3028 (7th Cir. 1980), the bargaining orders were supported only by violations of Section 8(a)(1) and not, as in the instant case, by the discharge of the two leading union adherents and the sudden layoff of fourteen additional employees.

Finally, contrary to petitioner's contention (Pet. 6-9), nothing in the decisions cited above suggests that the Board may not fulfill its obligation to give reasons for a bargaining order by adopting the administrative law judge's analysis. Indeed, the only court which has considered such an argument has held that, under this Court's decision in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 525 (1978), agencies should be left free to establish their own procedures for decision-making; therefore,

> [s]o long as the ALJ has provided a statement of reasons for its recommendation of a bargaining order * * * and so long as the NLRB has specifically indicated its adoption of the findings and reasoning of the ALJ * * * the need for a separate elaboration of the factors prompting a bargaining order would appear to have been met.

Kenworth Trucks of Philadelphia v. *NLRB*, 580 F. 2d 55, 62-63 (3d Cir. 1978) (opinion on rehearing). See also *NLRB* v. *Solboro Knitting Mills, Inc.*, 572 F. 2d 936, 944 (2d Cir. 1978) ("we agree, for the reasons given by the ALJ [and adopted by the Board], that the bargaining order was appropriate under *Gissel*").

2. Petitioner further contends (Pet. App. 14-16) that the court of appeals erred in affirming the Board's conclusion that Stone was not a supervisor. That question raises only an evidentiary issue which does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, as is evident from the facts set out in the statement, *supra*, there was ample evidence to support the Board's conclusion that Stone belonged to that class of "straw bosses, leadmen, set-up men, and other minor supervisory employees" whom Congress did not intend to exclude from the Act's coverage. See S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947).[3]

---

[3]Contrary to petitioner's assertion (Pet. 11-14), affirmance of the Board's conclusion that Stone was not a "supervisor," within the meaning of Section 2(11) of the Act, 29 U.S.C. 152(11), is neither "inconsistent" nor "at variance with" the decisions in *NLRB* v. *Porta Systems Corp.*, 625 F. 2d 399 (2d Cir. 1980); *NLRB* v. *Publishers Printing Co.*, 625 F. 2d 746 (6th Cir. 1980); *NLRB* v. *Pilot Freight Carriers, Inc.*, 558 F. 2d 205 (4th Cir. 1977); *NLRB* v. *Big Ben Department Stores, Inc.*, 396 F. 2d 78 (2d Cir. 1968); *Trailmobile Division, Pullman, Inc.* v. *NLRB*, 379 F. 2d 419 (5th Cir. 1967); or *Buddy Schoellkopf Products, Inc.*, 164 N.L.R.B. 660, 666 (1967), enforced 410 F. 2d 82 (5th Cir. 1969). In each of these cases the court recognized that the question of the individual's status as a "supervisor" depended entirely on the facts in the record pertaining to the individual's authority to exercise independent judgment in the course of responsibly directing his fellow employees. As the Second Circuit observed, "the gradations of authority 'responsibly to direct' the work of others from that of general manager or other top executive to 'straw boss' * * * are so infinite and subtle that of necessity a large measure of informed discretion is involved in the exercise by the Board of its primary function to determine those who as a practical matter fall within the statutory definition of a 'supervisor' * * *. Each case must be decided on its own facts * * *" (*NLRB* v. *Big Ben, supra*, 396 F. 2d at 82) (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Acting Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CANDACE M. CARROLL
Attorney
National Labor Relations Board

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CLERK

In the Supreme Court of the United States
OCTOBER TERM, 1980

MACHINE TOOL AND GEAR, INC., PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

THE FISHMAN GROUP
By: Steven J. Fishman
and
Malcolm D. Brown
(Donald H. Scharg with
them on the Brief)
Attorneys for Petitioner,
Machine Tool and Gear, Inc.
2550 South Telegraph Road
Suite 107
Bloomfield Hills, MI 48013
(313) 338-8700

RENAISSANCE PRINTING COMPANY, 76 W. ADAMS, KALES BUILDING,
DETROIT, MICHIGAN 48226 – PHONE (313) 964-3185

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I.

RESPONDENT'S BRIEF IN OPPOSITION MUST BE STRICKEN FROM THE RECORD

Petitioner, Machine Tool and Gear, Inc. ("MTG") filed its "Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit" on December 29, 1980, and made timely service upon the National Labor Relations Board and the Solicitor General of the United States (collectively "Respondent") pursuant to Sup Ct Rules 22.3 and .4 respectively. Upon the request of the Respondent, the parties agreed and stipulated to extend the time for the Respondent's "Brief in Opposition" to and including March 4, 1981. This stipulation was accepted by the Clerk of the Supreme Court.

However, the filing deadline of March 4, 1981, passed without the filing of the "Brief In Opposition" with this Court as Respondent so stipulated and agreed. Moreover, Respondent never undertook its responsibility to notify MTG and the Clerk of the Supreme Court of the passing of time limit or the need for another extension of time. Instead, Respondent took it upon itself to ignore the Supreme Court's rules and set its own arbitrary timetable. The "Brief In Opposition" was not filed until March 18, 1981, 14 days late.

Respondent may believe that it can pick and choose which rules it wishes to follow, but such is not the case. Supreme Court Rule 22.1 requires that Respondent's "Brief In Opposition" must be filed with this Court within the time enlarged by the stipulation. Respondent's "Brief In Opposition" was filed late and therefore, not within the time permitted by the court rule. Supreme Court Rule 22.1 specifically speaks to this attempted late filing by Respondent, mandating that,

> "The clerk *shall not* accept a brief which does not comply with this Rule . . ." (emphasis added).

The Rule's operative words, "shall not" are mandatory commands which prohibit the late filing of Respondent's "Brief In Opposition". Since the "Brief In Opposition" was not filed in conformity with Sup Ct Rule 22.1, it must be stricken from the record before this Court.

II.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Three recent decisions from the Third and Fifth Circuit Courts of Appeals, reported in the two months since the filing of the Petition for a Writ of Certiorari, accentuate the need for immediate review and direction by the Supreme Court. These three opinions, *NLRB* v *K & K Gourmet Meats, Inc.*, ____ F2d ____, 106 LRRM 2448 (3rd Cir. 1981); *NLRB* v *Permanent Label Corporation*, ____ F2d ____, 106 LRRM 2211 (3rd Cir. 1981); and *NLRB* v *Dadco Fashions, Inc.*, ____ F2d ____, 106 LRRM 2022 (5th Cir. 1980) illustrate the confusion and conflict over this Court's pronouncements in *NLRB* v *Gissel Packing Company, Inc.*, 395 US 575 (1969). Moreover, *Dadco Fashions*, underscores the National Labor Relations Board's ("NLRB" or "Board") results-oriented approach to determining supervisory status.

A. Confusion Continues Over The Proper NLRB Analysis Necessary For Gissel Bargaining Orders

In *K & K Gourmet Meats*, *Permanent Label*, and *Dadco Fashions*, the Third and Fifth Circuits examined *Gissel* bargaining orders in which the Board merely rubber-stamped the *Gissel* remedy, without any analysis by the Board itself or its Administrative Law Judges ("ALJ"). These three decisions generated a total of seven written opinions on the perceived impact of and requirements for a valid *Gissel* bargaining order. The varied responses in the majority, concurring, and dissenting opinions vividly highlight the need for this Court's intervention and guidance.

In *K & K Gourmet*, the Third Circuit criticized the Board for indulging in "... the grossest kind of speculation ..." by arbitrarily implementing bargaining orders without properly

analyzing facts to determine whether a secret election was possible. *Id.* at 2455. Denying enforcement of the bargaining order, Judge Max Rosenn reminded the NLRB that,

> "The selection of an exclusive collective bargaining agent is not a game of chance but a matter of the highest importance to employees and employers alike. *Legislation and experience indicate that an employee's statutory right to select an exclusive bargaining agent should be determined by democratic process in a free and open election. The Board's responsibility for holding such election was not meant to be supplanted by the authority found to exist in Gissel.*" *Id.* at 2455 (emphasis added).

Rather than remanding the case to the NLRB for further analysis, the Court reviewed the facts and determined that a bargaining order was not necessary. *Id.* at 2455-2456.

This decision drew the ire of dissenting Judge John J. Gibbons who accused his brethren of intentionally attempting to sabotage *Gissel*, because they did not agree with it. According to Judge Gibbons, the Third Circuit is currently engaging in,

> "... *guerilla warfare against Gissel orders* ... [either] by insisting that the Board's opinion writing is so opaque that we cannot understand it and ... [or] ... the majority simply substitute[s] its fact finding for that of the Board." *Id.* at 2456 (citation omitted; emphasis added).

In *Permanent Label*, three separate opinions were filed on *Gissel* and its correct application. There, the Third Circuit affirmed the Board's finding of substantial and pervasive unfair labor practices, but again refused enforcement of a *Gissel* bargaining order because the NLRB had ignored the Court's request for a,

> " . . . statement of reasons leading it to impose a bargaining order. * * *
>
> *Rather, it relied on the ALJ's conclusory statement that 'these unfair labor practices cannot be corrected by conventional remedies, including a re-run election'.* * * *
>
> *We need more.*" *Permanent Label* at 2216 (footnote and citations omitted; emphasis added).

After denying enforcement, the Court remanded the case to the NLRB for more specific findings to support the Board's decision that a re-run election could not be held.

Concurring in the remand to avoid additional delays caused by the three separate opinions, Judge Leonard I. Garth would have preferred,

> " . . . *an outright denial of enforcement* so that a new election may be expedited, rather than a remand for a time-consuming, belated justification by the Board of its determination to impose a bargaining order. Remand not only presents a possibility that this Court will once again have to review this case, but of greater concern, additional delay will now occur during which the employees of *Permanent Label* will be unable to exercise their franchise in the selection of their representative, if indeed they desire one." *Id.* at 2217. (Citations and footnotes omitted; emphasis added).

Dissenting, Chief Judge Collins J. Seitz, would have enforced the order believing that the ALJ's listing of the unfair labor practices was sufficient to justify a bargaining order. *Id.* at 2222.

Permanent Label is also noteworthy because it distinguished *Kenworth Trucks of Philadelphia, Inc.* v *NLRB*, 580 F2d 55

(3rd Cir. 1978), cited at page 8 of our Petition. The Third Circuit concluded in *Kenworth* that the NLRB could delegate to an ALJ its responsibility to make specific findings regarding *Gissel* remedies if the Board expressly adopts the analysis and conclusions. *Permanent Label* at 2216, n. 12. As in the instant case, neither the NLRB nor the ALJ engaged in any analysis to support the bargaining order, thus requiring denial of its enforcement by the Third Circuit.

The Fifth Circuit has further compounded the conflict between the circuits and the NLRB by its decision in *Dadco Fashions*. In a complete about-face, the Fifth Circuit announced they will now enforce *Gissel* bargaining orders. The *Gissel* remedy previously denied enforcement under *NLRB* v *American Cable System, Inc.*, 427 F2d 446 (5th Cir. 1969), *cert. den.*, 400 US 957 (1970), because such bargaining orders contained only a " . . . litany, reciting conclusions by rote without factual explanation." *Id.* at 449. Complaining that the Fifth Circuit was ignoring the sound principles established in *American Cable*, dissenting Judge Thomas Gee was "unwilling to bow to the Board's apparent resolve to broaden the *Gissel* exception . . ." *Dadco Fashions*, at 2027.

Rather than providing answers, *K & K Gourmet Meats*, *Permanent Label*, and *Dadco Fashions*, increase the confusion concerning proper *Gissel* bargaining orders. The conflict and confusion over the proper interpretation of *Gissel* must be resolved because,

> "*Conscientious Board members reading our opinions from Armcore Industries in 1976 to Permanent Label in 1981 must be puzzled about what they should do in a Gissel bargaining order case to satisfy us.*" *K & K Gourmet*, at 2456 (Gibbons, J, dissenting). (emphasis added).

Judge Gibbons has truly identified the problem. However, this observation would have been even more accurate if Judge

Gibbons had further realized that beside the NLRB and the appellate courts, the labor bar is also confused as to the standard of review in *Gissel* cases. Guidance from this Court is not only helpful, but needed. It has been twelve years since *Gissel* and the t' ne is ripe for clarification.

B. NLRB Identification Of Supervisors Continues On A Result-Oriented Course

NLRB v *Dadco Fashions, Inc.*, ____ F2d ____, 106 LRRM 2022 (5th Cir. 1980) also underscores the NLRB's result-oriented approach to determining supervisory status, which was pointed out by Judge Van Graafieland in *NLRB* v *Porta Systems*, 625 F2d 399 (2nd Cir. 1980). See Petition at 14-15. In *Dadco Fashions*, certain employees were alleged to have committed unfair labor practices during an organizational drive, which the Board attributed to the employer by ruling *that the employees were supervisors*. As the Board opinion (243 NLRB No. 170, Slip. Op. at 4-5) and the Fifth Circuit opinion (106 LRRM at 2024) make clear, these individuals had *less* supervisory authority than Gregory Stone, who the Board and the Sixth Circuit found was *not* a supervisor. The facts are virtually indistinguishable and they defy an attempt to justify the differing results. We can only ask the Court to read these opinions and see if, in its mind, there is any meaningful difference. We find none.

The differing results do, however, have a common thread. As Judge Van Graafieland noted in *Porta Systems*, that thread is the "results-oriented" approach the Board uses. A finding of supervisory status in *Dadco Fashions* allowed the allegedly coercive statements to be attributed to the employer, thus providing the basis for a bargaining order. By *not* finding supervisory status in the instant case, the Board was able to count the authorization cards solicited by Gregory Stone, find a card majority and enter a bargaining order. The Board's result-oriented approach to supervisory status is clear.

It must come to an end. The NLRB must return to its role as a neutral. Guidance and instruction from this Court is necessary.

CONCLUSION

For the foregoing reasons, Machine Tool and Gear, Inc. prays that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

By: Steven J. Fishman
and
Malcolm D. Brown

(Donald H. Scharg with them
on the Brief)

Attorneys for Petitioner
Machine Tool and Gear, Inc.
2550 South Telegraph Road
Suite 107
Bloomfield Hills, MI 48013
(313) 338-8700